Jurisdictional Statement

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does the California sales tax collected beginning January 1, 1979, from retailers measured by their gross receipts from leases to the United States violate the United States Constitution by imposing the legal incidence thereof on the United States (Supremacy Clause) or by discriminating against the United States or its lessors (Equal Protection Clause)?

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No. 80-5073

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

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JURISDICTIONAL STATEMENT

Appellant, California State Board of Equalization (hereinafter sometimes SBE) appeals from that portion of the judgment of the United States Court of Appeals, Ninth Circuit which upheld and refused to order vacation of

declarations of unconstitutionality of the Federal District Court for the Central District of California and an injunction against collection by SBE of sales tax from retailers leasing tangible personal property in California to the United States and other orders resulting therefrom.

OPINIONS BELOW

The opinion of the Ninth Circuit appealed from is reported at 650 F.2d 1127. It also appears as Appendix A hereto (pages A-1 through A-24). The judgment of the federal district court below appears as Appendix B (pages A-25 through A-34). The findings of fact and conclusions of law of the federal district court appear as Appendix C (pages A-35 through A-62). The order of the Ninth Circuit on Petition for

Rehearing appears as Appendix D (page A-63).

GROUNDS FOR JURISDICTION

1. Nature of Proceeding and Statutory Basis for Federal Jurisdiction:

This is an action commenced by the United States against the California State Board of Equalization (which administers the California Sales and Use Tax Law) for declaratory relief, injunction and money. It is based upon the assertions by the United States that California's collection of sales tax since January 1979 from retailers measured by their gross receipts from leases of tangible personal property to the United States constitutes unconstitutional taxation of the United States and discrimination against the United States and the retailers. Federal jurisdiction was

asserted under sections 1331 and 1345 of Title 28, of the United States Code.

2. Dates of Judgment and Appeal:

The decision of the Ninth Circuit was issued July 13, 1981. A Petition for Rehearing was filed July 27, 1981. That petition is Appendix E hereto (pages A-64 through A-92). The Petition for Rehearing was denied September 2, 1981. (Appendix D p. A-63.) The Notice of Appeal (Appendix F pp. A-93 through A-94) was filed in the Ninth Circuit on November 13, 1981.

3. Jurisdiction:

Jurisdiction of this appeal is conferred by 28 U.S.C. section 1254, paragraph (2) which provides review by the Supreme Court "By appeal by a party relying on a State statute held by a

Court of Appeals to be invalid as repugnant to the Constitution. . ."[1]

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1. The District Court judgment appealed from provided for a separate determination of the amounts of money the United States was entitled to recover under the court's judgment. It has been considered as a final judgment of all constitutional and other questions by the United States, District Court and Court of Appeals. The District Court issued a permanent injunction against the collection of the California Sales Tax which according to the complaint amounts to six million dollars per year. Unless the constitutionality is promptly decided California will loose huge sums of revenue which it may be unable to collect because of passage of time. The parties and Court of Appeals recognized the importance of a prompt resolution of the constitutional issues presented here by requesting and granting an early hearing on the appeal. Should this Court conclude that an appeal is inappropriate, it is requested that this Jurisdictional Statement be considered a Petition for Writ of Certiorari under paragraph (1) of U.S.C. section 1254, and this Court grant said writ and set a hearing thereon in order to resolve as quickly as possible the constitutional issues which substantially affect California revenues and California's ability to fund the necessary governmental functions.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional provisions upon which plaintiff asserts unconstitutionality are the Supremacy Clause which provides:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U.S. Const., art. VI, par. 2.

and the Equal Protection Clause of Amendment XIV, section 1 which provides:

> "All persons born or naturalized in the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

> State deprive any person of life, liberty, or property, without due process of law;" nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., art. XIV, § 1.) [Emphasis added.]

The California statutory law with which we are concerned is its Sales and Use Tax Law, which is Part 1, Division 2 (sections 6000 et seq.) of the California Revenue and Taxation Code. [All citations not otherwise indicated are to this code].

Provisions considered material by SBE to the "legal incidence" determination are the following:

Section 6051 which provides that for

> "the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of . . . percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail

in this state. . ." (Appen. G, pp. A-95 through A-96);

Section 6006 defines "sale" to include:

> "any lease of tangible personal property." (Appen. H, pp. A-97 through A-100.);

Section 6012 provides that the sales tax measure ("gross receipts") is "the total amount of the sale or lease or rental price," with various specific inclusions and exclusions. It concludes:

> ". . . For the purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil Code shall apply determining whether or not the retailers have absorbed the sales tax." (Appen. I, pp. A-101 through A-107.) [The Ninth Circuit held that this paragraph shifted the "legal incidence" to the purchaser-lessee.]

SBE's application of section 6012 (to exclude from tax measure a retailer's sales tax whenever he can show it was taken into account in reaching a sales price) is shown by its Audit Manual, paragraphs 0416.05 and 0416.10. (Appen. J, pp. A-108 through A- 113.)

The United States bases its contentions that the legal incidence of California's sales tax is on the consumer in part upon California Civil Code section 1656.1. (Appen. A, fn. 3, pp. A-6 through A-12.) [This contention was rejected by the Ninth Circuit.]

The California legislature in amending the sales tax law to delete provisions which had been held to shift legal incidence (and make other changes) declared its

intention was "to make it clear that both for federal and state purposes the incidence of the California sales tax is upon the retailer. . . and is not upon the purchaser." (Cal. Stats. 1978, ch. 1211, § 19; Appen. K, pp. A-114 through A-115.)

Statutes SBE considers material to show that there is no unconstitutional discrimination are the following: A use tax at the same rate as the sales tax is imposed by section 6201 (Appen. L, p. A-116 and A-117) on the storage, use, or other consumption of tangible personal property purchased, for use in California from a retailer. The retailer must collect and pay the use tax to the state under section 6203. (Appen. M, p. A-118 to A-120.) Both the sales tax and the use tax are

applicable in the same situations; however, exemption provisions of sections 6390 (Appen. N, p. A-121) and 6401 (Appen. O, p. A-122) excuse payment of a sales tax where a use tax is payable on leases and excuse payment of a use tax where sales tax is payable on other transactions.

STATEMENT OF THE CASE

1. Material Facts:

Beginning January 1, 1979,[2/] California collected sales tax from retailers measured by their gross receipts from leases to the United States of tangible personal property in California.

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2. In 1976 this Court ruled in Diamond National v. State Board of Equalization (1976) 425 U.S. 268, that the legal incidence of the California Sales Tax was on the national banks as purchasers and therefor constitutionally prohibited. Since this Court granted no

U.S.A. leases in California

data processing and other equipment

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2. (footnote continued)

hearing and simply referred to its earlier Agricultural Bank v. Tax Commission case (1968) 392 U.S. 339, it is apparent that such decision was based upon the presence in the California sales tax law at that time of provisions requiring collection of the tax by the retailer from the consumer and making it unlawful to represent that the sales tax will not be added to the selling price. These were similar to provisions in the Massachusetts sales tax law which caused this Court to conclude that the legal incidence of the Massachusetts sales tax was on the purchaser. Accordingly, California ceased collecting sales tax on sales or leases to national banks, the United States and other constitutionally immune purchasers. Thereafter by legislation effective January 1, 1979, the Legislature repealed the provisions in the sales tax upon which this Court had based its determination of unconstitutionality and made other changes in the sales tax law, stating its intention,

"to make it clear that for both federal and state tax purposes the incidents of the California sales tax is upon the retailer . . . not upon the purchaser." (Chapter 1211 Cal. Stats. 1978, § 19 (Appen. K, p. A-114.)

from various lessors. (Complaint ¶ 4.) These leases are negotiated arms length by experienced businessmen familiar with California Sales and Use Tax law and represented by legal counsel who knowingly negotiate terms at arms length without relying on presumptions pertaining to the California Sales and Use Tax Law. (Declar. of Neal J. Gobar filed October 29, 1979, p. 7, line 21 to p. 8, line 16.) Whether the lessor is paid reimbursement by the United States for his sales tax is determined solely by their contractual arrangements. (Ibid.)

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2. (footnote continued)

Therefore the earlier decisions were no longer applicable and the effect of the California sales tax must be determined on the basis of its present provisions and interpretations.

For the first six months of 1979 the United States allegedly paid three million dollars tax reimbursement to its lessors. (Complaint ¶ 10.) In another suit USA alleged that large sums of sales tax had been collected by California from retailers leasing and selling to other federally immune instrumentalities. Therefore, the question whether California's sales tax is unconstitutional when measured by a retailers gross receipts from leases and sales to federally exempt instrumentalities affects millions of dollars of California's revenues annually and has a large fiscal impact on the State of California.

The California sales tax law as administered by SBE permits retailers to exclude from their tax measure the amounts of sales tax paid by them whenever such

amounts are not "absorbed" by the retailer (§ 6012), i.e. whenever the burden of the tax is actually passed on. To qualify a retailer may merely post a notice that the sales price includes tax reimbursement or otherwise show that he "has actually taken [the tax on him] into consideration in determinining the total sales price. . . ." (See California State Board of Equalization Audit Manual General Audit Procedure § 0416.00, Appen. J, p. A-109.) This is true whether or not the consumer (purchaser or lessee) has any knowledge that sales tax has been considered in the sales price. There is no requirement in the California law that a retailer must separately state a sales tax (reimbursement) charge to his

customer in order to exclude his sales tax from his tax measure.[3/]

The California Sales Tax is an excise tax on retailers for the privilege of selling tangible personal property at retail (including the leasing thereof).

Gross receipts from leases included in the use tax measure are exempted from inclusion in the sales tax measure. The use tax is also payable by the retailer but collectable by a retailer from its customer. Retailers' gross receipts from insurance companies (and formerly state and national banks) as well as leases to federally exempt

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3. The Ninth Circuit simply misstated the California law in this respect, then appeared to base its determination of unconstitutionality on this misstated law. The error was pointed out by Petition For Rehearing pages 4-9. (Appen. E, pp. A-64 through A-92.)

instrumentalities are subjected to sales tax, while a use tax (at the same rate and on the same meausre) is collected from retailers based on their receipts from all other similar leases.

2. Questions Raised Below:

The United States commenced this action in Federal District Court requesting declarations that the legal incidence of the present California sales tax unconstitutionally falls upon it as lessee and such tax unconstitutionally discriminates[4/] against it and its

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4. The United States initially argued and convinced the district court to rule that an earlier federal district court finding of discrimination (which had been appealed but never ruled on by the Court of Appeals) collaterally estopped SBE on this issue. The United States, however, conceded in its brief before the Ninth Circuit (footnote 20, page 29), that SBE "is not precluded by the doctrine of collateral estoppel or res judicata from litigating this issue before this Court [the Ninth Circuit] in this case."

lessors. It also requested a judgment for the amount of sales tax reimbursement it contracted to pay to its lessors and an injunction against future collection of sales tax measured by leases to it.

The plaintiff filed a motion for partial summary judgment declaring (among other things) such unconstitutionality. Such partial summary judgment was granted. The district court made its findings of fact and conclusions of law and entered a judgment declaring the California statute unconstitutional on both grounds and enjoining future collection of the sales tax. (Appen. C, pp. A-29 through A-34.) SBE appealed therefrom. The Ninth Circuit affirmed the unconstitutionality based upon the supremacy clause and declined to reach the discrimination question. SBE's Petition For Rehearing

requesting the Ninth Circuit to determine the discrimination issue and reconsider its determination of the supremacy issue was denied.

* * *

SUBSTANTIAL QUESTIONS ARE PRESENTED

The lower federal courts have held the state taxing statute to be unconstitutional. This deprives California of large amounts of revenue[5/] and further increases a large deficit in state financing.

The determination below that the legal incidence of the California Sales Tax is on the United States as

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5. The complaint filed in August 1979 claimed a refund of an estimated three million dollars. This represents at most reimbursement paid by the United States itself to its lessors for the first six months of 1979 -- only the tip of the iceberg. It does not include sales taxes paid by lessors during this period for which they had not sought reimbursement from the United States at the time the complaint was filed. Nor does it include any sales taxes measured by gross receipts from sales or leases to federally immune instrumentalities other than the United States itself. Thus the judgment appealed from might well be depriving the State of California of ten million dollars per year or more in tax revenues.

lessee directly conflicts with the ruling of this Court in Gurley v. Rhoden (1975) 421 U.S. 200. Here the Ninth Circuit completely ignored the factors which this court in Gurley held caused the "legal incidence" of the federal gasoline excise tax not to be passed on even though it was added to the pump prices and had been called a "user tax."

The effect of the lower court decision is to reject the very "legal incidence" test enunciated by this Court in Alabama v. King and Boozer (1941) 314 U.S. 1 which it purports to follow, by ignoring the word "legal" and equating the word "incidence" to the very "economic burden" test rejected by this court in King and Boozer and all subsequent cases. A decision by this court is necessary to reestablish the clear line between constitutionally permitted

taxes (which may economically burden the United States) and prohibited taxes, the legal incidence (legally enforceable obligation to pay -- directly or indirectly -- whether or not actually enforced) of which is placed on the United States.

Further the decision appealed from here misstates the California sales tax law. Section 6012 allows a retailer to exclude the amount of his sales tax from his taxable gross receipts whenever he passes the burden on to his customer by including his sales tax expense in determining his sales price. The Ninth Circuit incorrectly concluded that such exclusion is permitted only when an amount of sales tax is separately charged to a customer (and thus induced such separate charge.) The Ninth Circuit construed this as proof of legislative

intent to place the "legal incidence" on the United States, ignoring clear language in section 6051 placing the tax solely on the retailer and declarations by the legislature of its intent.

The discrimination issue is also significant and should be resolved promptly by this court. The same federal district court judge has three times found discrimination; the Ninth Circuit has twice refused to decide this issue; the third ruling is now on appeal. (See Petn. for Rehg. Appen. E, pp. A-82 and A-83.) SBE believes such rulings conflict directly with United States v. County of Fresno (1977) 429 U.S. 452; United States v. City of Detroit (1958) 355 U.S. 466, and Southern Pac. Co. v. Gallagher (1939) 306 U.S. 167, which SBE believes permit complimentary taxes to be imposed; so that in instances in which

the primary taxpayer is exempt or immune from tax, an alternative tax at the same rate may be placed on a different taxpayer with a related but different interest in the transaction or property.

Finally, the Ninth Circuit clearly violated three federal procedural rules in reaching its conclusion of unconstitutionality. First, it ignored the long standing administrative interpretation of section 6012 by the government agency which administers the law; second, it upheld a summary judgment in the face of contrary evidence as to the effect of section 6012 and without uncontroverted admissible evidence supporting each factual determination; and third, the court selected an unconstitutional meaning for the California statute rather than an at least equally reasonable constitutional interpretation.

A. Section 6012 Does Not Shift the Legal Incidence of the California Tax to the Customer

The Ninth Circuit misstated the actual application of the California law as follows:

> "If the lessor requires the lessee to pay the tax, the amount of the tax is deducted from the lessor's gross receipts. If the lessor pays the tax himself -- absorbs the tax -- and passes the economic burden of the tax on to the lessee as an increase in the lease price, the amount of the tax paid by the lessor is not deducted from his gross receipts. . . . Therefore, the lessor maximizes his profit only if he separately states and collects the tax from the lessee. This point is clearly illustrated by the example in footnote 6." (650 F.2d 1127 at 1131, Appen. pp. A-18 to A-19.)

From this false premise the Ninth Circuit then concluded

> "the strong economic incentive created by Section 6012 all but compels the lessor to collect the tax from the lessee. In sum the California, sales tax scheme manifests a legislative

> intent that the lessee pay the sales tax. It places the legal incidence of the tax on the United States and, therefore, violates the United States' constitutional immunity from state taxation." (650 F.2d at 1132, Appen. pp. A-20 to A-22.)

The foregoing quoted portion of the Ninth Circuit decision misstates the factual and legal effect of the California sales tax law section 6012. It misinterprets and misapplies the concept of "legal incidence" contrary to the decisions of this court, particularly Gurley v. Rhoden, supra. The above quoted language is the portion of the Ninth Circuit decision which is the primary subject of this appeal.

1. California Sales Tax Measure Excludes the Sales Tax Itself Whenever the Economic Burden is Passed on Whether or not Tax Reimbursement is Separately Stated to the Customer

The Ninth Circuit's statement that if the lessor (retailer) "passes

the economic burden of the tax on to the lessee as an increase in the lease price, the amount of the tax paid by the lessor is not deducted from his gross receipts" is simply wrong. The court's subsequent statement that "the lessor maximizes his profit only if he separately states and collects the tax from the lessee" is also wrong both as a matter of fact and law. The illustrative footnote in the court opinion (which was taken from the brief of the United States) is also wrong. This was pointed out both in the Board's reply brief and in its petition for rehearing. (Appen. E, pp. A-76 to A-77.)

The section misconstrued by the Ninth Circuit is a definition of "gross receipts." Gross receipts is the measure on which sales tax is paid. Section 6012 lists a number of items and otherwise

indicates which of the various components which go in to the amounts ultimately paid by a customer are to be included in and which are to be excluded from the sales tax measure, i.e. "gross receipts." This section has been in the law for many years. It clearly has that purpose and only that purpose.

The last paragraph of section 6012 is that portion misconstrued by the Ninth Circuit. It provides

> "For the purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil Code shall apply in determining whether or not the retailers have absorbed the sales tax."

The California State Board of Equalization, the defendant herein administers the California sales tax law. California has interpreted this section and administered it to require only that a retailer be able to prove to the satisfaction of the board that he has not absorbed the tax but has actually taken it into consideration in determining the total sales price of the merchandise in order to exclude the sales tax from his measure.[6/]

The language of the California statute itself refutes the interpretation adopted by the Ninth Circuit. That provision allows exclusion on a showing that

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6. The SBE audit manual specifically so provides. (See Appen. pp. A-108 to A-109.) This was brought to the Ninth Circuit's attention at once after that court misstated the effect of section 6012. (Petn. for Rehg. Appen. pp. A-70 through A-77.)

the amount of the sales tax has been added to the total amount of the sales price and not been absorbed by the retailer. This must be established "to the satisfaction of the board." It is thus clear from the face of the statute that the SBE is given discretion in determining what circumstances establish that sales tax has been added and not absorbed.

The board's audit manual (Appen. J) makes it clear that the board in exercising the discretion given to it by statute allows retailers to exclude their sales tax from their sales tax measure merely by showing that the retailer "has actually taken it into consideration in determining the total sales price of the merchandise."

In effect a retailer is always permitted to exclude from his sales tax

measure amounts which he includes therefor in determining his ales price (as well as amounts of sales tax [reimbursement] which are separately stated and charged) to the customer. This is made even more clear by the last sentence of section 6012 which allows retailers to establish that they have not absorbed the tax by various methods (described in Civil Code section 1656.1) including the mere posting a notice that "all prices include sales tax reimbursement . . ." (Civ. Code § 1656.1, par. (b)).

Thus it is clear that whenever a retailer can by any satisfactory evidence show that he has passed the economic burden on to his customer, the amount of sales tax is excluded from his tax measure.[7/]

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7. This provision as construed and applied by California is only common sense. If a retailer does not take his

There is absolutely no requirement of any separate statement of tax reimbursement to the customer or that the customer even be aware that the

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7. (Footnote continued.)

own sales tax into account in determining the price he charges his customer, then it is clear that the sales tax is being absorbed by the retailer, the entire sale price is being paid for the property transferred and it should be fully included in the tax measure. On the other hand, if the retailer increases his price to cover his sales tax cost, it is reasonable to consider that the price being paid for the article itself is the price net of the increase for the sales tax cost, and it is appropriate to consider such net price as the tax measure.

As is pointed out by the audit manual, it is customary in many markets, taverns and restaurants to merely charge a lump sum price to customers without any mention of sales tax to them and to exclude sales tax from the tax measure by simply by presenting evidence to the board that the tax was considered in reaching the sales price.

The Ninth Circuit apparently relied on examples taken from Appellee's Brief (see 650 F.2d at 1132, fn. 6) which is wrong and had been pointed out by SBE to be wrong. (See Petn. for Rehrg., Appen. pp. A-76 to A-77.)

retailer took sales tax into account in arriving at the sales price (and thus excludes such amount from his tax measure). The Ninth Circuit was simply wrong when it concluded that only when sales tax (reimbursement) was separately charged to a customer could such amount be excluded under section 6012 from the retailers sales tax measure. (650 F.2d at p. 1131-21.)

In seeking a summary judgment the United States here had the burden of producing all facts necessary to establish its right to relief by clear undisputed admissible evidence. (F.R.C.P., Rule 56.) All inferences and unproven or disputed facts must be considered to exist against the United States -- the moving party. (Giordano v. Lee (8th Cir. 1970) 434 F.2d 1227.) The determination by the Ninth Circuit

objected to hereinabove that a lower tax measure may be obtained by a retailer/lessor only if he "separately states and collects the tax from the lessee" is not supported by uncontroverted evidence nor established as an uncontroverted fact. As shown above, the record contains substantial evidence of legislative intent that only the retailer pays sales tax and no substantial evidence in support of the effect of section 6012 found by the Ninth Circuit. Under such evidence granting summary judgment was clearly improper.

Secondly, the Ninth Circuit ignored the basic rule of statutory construction that is between two conflicting interpretations of a statute, one of which renders it valid and constitutional and the other of

which renders it invalid and unconstitutional, the court should apply the interpretation which renders the statute valid, effective, and constitutional. (Osborne v. Massachusetts Bonding and Insurance Company (D.C. Ariz. 1964) 229 F. Supp. 674, 677.) The Ninth Circuit chose an interpretation of Section 6012 which rendered the tax unconstitutional over an equally reasonable (and actually correct) interpretation under which the statute is valid and constitutional. This is an independent reason for reversing the lower court's misstatement of the effect of section 6012.

Finally, the Ninth Circuit totally ignored the administrative interpretation and application of the law by the administrative agency which administers it. Such administrative interpretation practice is strong

evidence of the meaning and effect of statutory provision. (Bell v. Brown (C.A.D.C. 1977) 557 F.2d 849, 855.)

Thus it is clear that the factual premise erroneously assumed by the Ninth Circuit that under Section 6012 a lessor is entitled to exclude his sales tax from his tax measure only if he separately states and collects the tax from the lessee is improper. Since this erroneous assumption of fact was the linchpin upon which the Ninth Circuit based its decision, its determination of unconstitutionality must be reversed.

2. Legislative Intent that the Legal Incidence of the California Sales Tax is Only on the Retailer (Lessor) is Clear from the Sales Tax Law Itself

The California sales tax statutes clearly state legislative intent:

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers" based on a percentage of their gross receipts. (§ 6051.)

This Court has held that the "wording of [a] federal statute . . . places the incidence of the tax upon the 'producer,'" where it provided for a tax "on gasoline sold by the producer," stating,

> "The congressional purpose to lay the tax on the 'producer' and only upon the 'producer' could not be more plainly revealed." (Gurley v. Rhoden (1975) 421 U.S. 200, 205.)

The California statute (§ 6051) even more clearly than the federal statute under consideration by this Court in Gurley makes the legislative purpose to lay the sales tax on the retailer and only on the retailer very clear.

Were the wording of section 6051 not sufficient, the California Legislature further specifically stated its intention in legislation enacted in 1978 which eliminated provisions which had earlier been held to shift for federal purposes the legal incidence of the sales tax. The Legislature declared as part of this statute,

> "This act provides for changes in the California Sales and Use Tax Law to make it clear that both for federal and state tax purposes the incidence of the California sales tax is upon the retailer for the privilege of selling tangible personal property at retail and is not upon the purchaser." (California Stats.

1978, ch. 1211, § 19, Appen. K, pp. A-114 to A-115.)

The Ninth Circuit below totally ignored the foregoing language in section 6051 and declaration of legislative purpose, stating that the California sales tax in this case "is facially neutral[8/] as to who is to pay the sales tax." (650 F.2d 1131.) Wrong! The intention of the California legislatue is absolutely clear, i.e. the incidence of and only legal obligation emanating from the California sales tax is upon the retailer and only upon the retailer.

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8. The Ninth Circuit court did recognize correctly that the rebuttable presumptions contained as part of California's contract law in its Civil Code (§ 1656.1) were intended to clarify and simplify contracting between private parties with respect to small day-to-day purchases, and did not represent a Legislative attempt to require the seller to pass tax on to the buyer.

The Ninth Circuit, while totally ignoring the foregoing clear statutory evidence that the legal obligation and the legal incidence is solely on the retailer, thought that it found contrary legislative intent in section 6012. (650 F.2d at 1131-32.) We pointed out above that the lower court misstated the meaning and actual effect of section 6012. Section 6012 does not treat transactions in which the economic burden is passed on by a mere increase in a lump sum sales price any different from those in which sales tax (reimbursement) is billed as a separate item. There is no economic incentive to separately bill an amount as "sales tax." In fact, markets, taverns and restaurants often do not (Appendix J); yet their tax measure is the same as if they did.

The Ninth Circuit correctly recognized that passing on the economic burden of the sales tax to the United States is okay (650 F.2d at 1131) and does not shift the "legal incidence." The only incentive in section 6012 is to shift the economic burden."

Thus, the sales tax law itself clearly shows legislative intent that the sales tax itself is paid solely by the retailer (not by the lessee as the Ninth Circuit erroneously stated).

SBE is unaware of any case other than this one where a court concludes that a provision which like section 6012 merely authorizes a taxpayer to exclude from his tax measure amounts included in or added to the sales tax to enable him to pay such tax by itself (or even as a factor considered with other

provisions) shifts the "legal incidence" of such tax to the taxpayer's consumer.

Even were section 6012 some evidence (which it is not) of a legislative intent to shift the "legal incidence" of the sales tax to the consumer, the substantial evidence of a contrary legislative intent (which was ignored by the lower court) would create a conflict in the evidence of legislative intent which on a motion for summary judgment must be resolved against the moving party. For this reason also the Ninth Circuit erred in finding "a legislative intent that the lessee pay the sales tax." (650 F.2d at p. 1132.)

The lower court's ruling in effect abandons any meaning for the terms "legal incidence" and holds unconstitutional the California sales tax merely because the retailer is permitted to

exclude from his tax measure the amounts of sales taxes which he must pay where he passes that economic burden on. This result directly conflicts with the earlier holdings of this Court and particularly Gurley v. Rhoden (421 U.S. 200).

3. The Lower Court Decision Does Not Properly Apply the "Legal Incidence" Test Mandated by this Court and Directly Conflicts With this Court's Decision in Gurley v. Rhoden

Since 1941 (Alabama v. King and Boozer 314 U.S. 1), this Court has consistently held that a tax is constitutionally prohibited only when the "legal incidence" thereof falls upon the United States (or other tax immune or exempt entities); there is no supremacy clause prohibition against a tax imposed upon a non-immune taxpayer even though the economic burden of that tax is shifted to the United States.

"The Constitution . . . does not forbid a tax whose legal incidence is upon . . . [another] . . . even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (United States v. Boyd (1964) 378 U.S. 39, 44.)

"The principles laid down in King & Boozer, Curry, Esso and Muskegon, we think strike a proper judicial accommodation between the interests of the States' power to tax and the concerns of the Nation, they are workable, and we adhere to them. If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its powers, not this Court, to make the desired adjustment." (Id. at pp. 50-51.)

This Court in Gurley v. Rhoden (1975) 421 U.S. 200, observed

"The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his his pump prices in the amounts

> of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer. The court has laid to rest doubts on that score. . . at least under taxing schemes, as here, where neither statute required petitioner to pass the tax on to the purchaser-consumer . . . " (421 U.S. 200, 204.)

The two taxes there under consideration were the federal gasoline excise tax arising under 26 U.S.C. § 4081 and a state gasoline excise tax.

It does not appear from the opinion whether these taxes were separately stated or whether the gasoline purchasers had any knowledge of the fact that the excise taxes were added to the pump prices. Thus, the Supreme Court apparently considered irrelevant to its decision, whether the parties by contract separately stated the excise tax (the very factor which appears to be the key to the decision below).

The constitutional question of legal incidence of the federal gasoline excise tax was directly raised in Gurley. SBE submits that this Court's analysis and decision there show the proper analysis to be made here and the constitutionality of the California sales tax in issue here.

This Court made an "independent examination of the federal statute and its legislative history" to determine that its legal incidence fell upon the statutory producer. (See p. 205.) The court looked first to the wording of the federal statute, stating that the "congressional purpose to lay the tax on the 'producer' and only on the 'producer' could not have been more plainly revealed." As has been pointed out hereinabove, the California sales tax even more strongly than the federal gasoline tax is clearly

imposed on retailers and not on their customers. (§ 6051.) Even further, the California Legislature specifically declared its intent that the legal incidence of the sales tax here in issue fall only on the retailer and not upon his customer. (Cal. Stats. 1978, ch. 1211, § 19.) (Yet, the court below totally ignored both of these clear statements of Legislative intent and erroneously stated that the Legislature had been "neutral.")

This Court in Gurley next stated,

> "Persuasive also that such was Congress's purpose is the fact that, if the producer does not pay the tax, the Government cannot collect it from his vendees; the statute has no provision making the vendee

> liable for its payment. [Foonote omitted.] Agricultural Nat. Bank v. Tax Comm'n., 392 U.S. 339 at 347, 20 L.Ed.2d 1138, 88 S.Ct. 2173." (Ibid.)

California sales tax also can be recovered only from the retailer. The California sales tax has no provision making the customer (purchaser or lessee) liable therefor.9/ These facts, which were found significant by this Court in the Gurley

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9. In 1978 Chapter 1211 (Cal. Stats.) repealed the sections similar to those in the Agricultural Bank case which authorized a retailer to collect the sales tax from his customer and made it illegal for retailers to hold out that they would absorb the tax. These are the sections upon which this Court concluded the Agricultural National Bank case that the legal incidence was shifted for federal purposes from the retailer to his customer. The provisions to this effect which were present in the California law in 1976 were thus eliminated in 1978. The California sales tax here under consideration places no obligation upon the customer (purchaser or lessee) for sales tax or reimbursement thereof to either the state or the retailer or anyone else.

case were totally ignored by the lower court here.)

In Gurley, this Court observed that the federal statutes gave a specific right to a consumer to recover overpaid gasoline tax, and the President and the Congress had referred to the federal gasoline tax as a "user tax.'" This court concluded that these facts did not indicate legal incidence on the consumer, observing that the refund statute had a separate valid function and the statements were not made in the context of considering "legal incidence." (421 U.S. at pp. 206-07.) Applying this reasoning here, it is clear that section 6012 has a separate valid function and was not enacted in context of considering "legal incidence"; thus section 6012 should not be considered as evidence of "legal incidence" on the consumer.

In Gurley this Court recognized that gasoline taxes are traditionally passed onto the consumer by raising the pump prices. Yet it held the legal incidence to remain on the gasoline seller. Traditionally sales taxes (as well as all other expenses of the seller) are passed on to consumers as well. Such acts do not shift the legal incidence of the tax. Such acts do not constitute the collection of the tax from the consumer. They constitute the proper shifting of the economic burden of the tax. By shifting the economic burden of the sales tax to his customer a California retailer enjoys the benefits under Section 6012 of excluding such amounts from his tax measure. There is no evidence in the record nor other proper basis for the findings of the Ninth Circuit that Section 6012 "all but compels the lessor to

collect the tax from the lessee," "manifests a legislative intent that the lessee pay the sales tax," and "places the legal incidence of the tax on the United States" as lessee in violation of constitutional immunity. (650 F.2d at 1132, Appen. p. A-20 to A-21.)

The Ninth Circuit's decision seriously conflicts with the tests of "legal incidence" uniformly prescribed by this Court, in Gurley v. Rhoden and other cases. It materially misstates the effect of section 6012. It uses the misstatement as proof of legislative intent to shift "legal incidence," in spite of its clearly different purpose -- and totally ignoring clear evidence of a contrary legislative intent. It ignores the total absence of any legal obligation imposed by statute on the consumer. It prohibits the State of California from collecting a large amount

of sales tax and interferes substantially with the fiscal revenue needs of this state. This Court should grant a hearing and reverse the clearly erroneous ruling of unconstitutionality.

B. The California Sales Tax on the Lessors Leasing to the United States Does not Unconstitutionally Discriminate

The District Court found as an alternative ground for enjoining collection of the California sales tax from retailers leasing to the United States that such tax unconstitutionally discriminated against them and the United States. The Ninth Circuit declined to consider this question. In order to lift the injunction against collection of the California sales tax that ruling must be reversed.

The United States argued and the District Court apparently concluded that since a different tax is collected from

retailers (sales tax) on leases to the United States from the tax which is collected from retailers with respect to most other leases (the use tax) unconstitutional discrimination resulted.

The California sales tax and its use tax are embodied in a single "Sales And Use Tax Law." (§ 6001 et seq.) They constitute a typical complimentary tax system, designed to collect a tax as a result of a transaction (sale or lease) whenever possible even though one party to the transaction may be a tax exempt or tax immune entity. The tax rate and tax measure are the same. The lessor is required to pay over the tax. The only difference complained of by USA is that the sales tax is on the retailer while the use tax is upon the consumer from whom the retailer is legally entitled to recover it.

SBE believes that the decisions of this Court, particularly United States v. County of Fresno (1977) 429 U.S. 452, United States v. City of Detroit (1958) 355 U.S. 466, and Southern Pac. Co. v. Gallagher (1939) 306 U.S. 167 (which upheld the California sales and use tax as complimentary taxes on sales, against constitutional attack) establish the validity of the California Sales and Use Tax Law. These cases reject the contention of the United States that unconstitutional discrimination exists where different taxes are imposed on different parties to a single transaction.

As stated by this Court in the County of Fresno case,

> "The economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed

> equally on other similarly situated constituents of the State." (429 U.S. at 462.)

The California sales tax is imposed uniformly whenever a lessee is exempt from use tax (including insurance companies and formerly state banks). USA did not show below (and cannot show) preferential treatment of others similarly situated. The retailers leasing to the United States are not disadvantaged. They can clearly pass the economic burden of the sales tax on to their customers, just as they can pass on the economic burden of the use tax -- whenever they elect not to absorb it.

This Court should not remand the equal protection question to the Ninth Circuit because this would leave the state enjoined from collecting its tax and further delay final resolution of the ultimate question -- whether or

not the State of California may collect a sales tax from retailers measured by their receipts from leases to the United States. Accordingly, it is respectfully requested that this Court note jurisdiction and promptly rule that there is no unconstitutional discrimination in collecting a sales tax from retailers measured by those leases to lessees who are constitutionally immune from California's use tax.

CONCLUSION

The lower court determinations of unconstitutionality conflict with decisions and rules established by this Court in landmark cases. The lower court decision enjoins the collection of a valid sales tax and deprives the state of substantial revenues badly needed in the operation of state and local government.

No known case has heretofore ignored clear statutory language and the legislative declaration of intent that the "legal incidence" lay entirely upon the retailer (not on the consumer) and declared (as the Ninth Circuit has here) that the constitutional "legal incidence" is shifted to a lessee who has absolutely no legal obligation therefor either to the state or to reimburse the lessor, simply because of an economic benefit to the lessor in shifting the economic burden of the tax to the lessee by either including the sales tax in reaching his rental price or agreeing with the lessee that sales tax reimbursement shall be paid. This Court should note jurisdiction and issue an opinion which holds that the legal incidence of the California sales tax does not fall upon the consumer (purchaser or lessee).

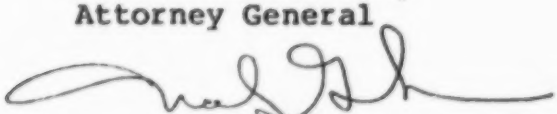
This Court should also note jurisdiction on the discrimination issue and rule that the complimentary taxes here do not unconstitutionally discriminate.

Our federal system of government requires that this Court take the lead in construing state and federal laws to complement each other and work together, rather than to create conflicts and violate constitutional prohibitions. The rules enunciated in earlier cases by this Court set up reasonable lines accomodating the needs of both the state and federal govenments. California sales tax on retailers measured by their receipts from leases to the United States can and should be construed and applied (as they have been construed and applied by California) to fit within the constitutional rules developed by this Court and to provide reasonable revenues to this

state. It is respectfully requested that this Court note jurisdiction, determine that California sales tax as construed and applied by the State Board of Equalization does not violate the federal constitution and reverse the injunction and judgment below.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General



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Appendix

81-1000

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No. 80[redacted]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

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APPENDIXES TO JURISDICTIONAL STATEMENT

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Appendix A

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 80-5073

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendant-Appellant.

[Argued and Submitted
April 10, 1981.
Decided July 13, 1981]

Before: KENNEDY and NELSON, Circuit Judges, and RICHEY,* District Judge.

RICHEY, District Judge:

The California State Board of Equalization raises three issues in this

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* The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

appeal: (1) whether the district court erred in holding that the legal incidence of the California sales tax falls on the United States; (2) whether the district court incorrectly concluded that the imposition of the sales tax on United States' leases invidiously discriminates against the United States and its lessors; and (3) whether certain other portions of the district court's judgment are unsupported by the record. We affirm the district court's decision that the California sales tax is unconstitutional as to leases of tangible personal property to the United States because the legal incidence of the sales tax falls on the United States. In light of this holding, we find it unnecessary to reach the discrimination issue. Certain portions of the district court's judgment

are unsupported by the record and are therefore vacated.

FACTS

Since August 1, 1965 the United States has leased data processing and other equipment from lessors in California. The State of California, through the State Board of Equalization (SBE), has imposed a sales tax[1/] on these transactions based on the gross rentals paid by the United States to the lessors.

In September 1974, the district court held that imposing the sales tax on these transactions infringed on the United

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1. The use tax, rather than the sales tax, is generally imposed on lease transactions. See California State Board of Equalization, Sales and Use Tax Regulation 1660. The sales tax is imposed on leases of tangible personalty when the lessee is exempt from the use tax under California law. Id. The United States is exempt from the use tax. See Cal.Rev. & Tax. Code § 6402 (West 1970).

States' constitutional immunity from state taxation because the legal incidence of the tax fell on the United States. This court affirmed the judgment of the district court. United States v. State Board of Equalization Code, 536 F.2d 294 (9th Cir. 1976) (per curiam).

On September 26, 1978 California adopted chapter 1211 of the California Laws of 1978. This chapter repealed the sections of the California Revenue and Taxation Code which the district court found unconstitutional. It also added Section 1656.1 to the California Civil Code. This section purported to leave the decision of who would pay the tax to the agreement of the buyer and seller.[2/]

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2. As noted above the sales tax applies to leases. Therefore, when the various California tax statutes use the

Pursuant to Chapter 1211, and beginning January 1, 1979 the SBE resumed imposing a sales tax on leases to the United States. The United States subsequently filed suit in the district court seeking a declaration that the imposition of the sales tax to the United States' leases was unconstitutional, an order enjoining the SBE from assessing or collecting the sales tax on theses [sic] leases, and a refund of all taxes paid by the United States to its lessors. The district court granted the United States' cross-motion for summary judgment and the SBE appealed.

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words "seller" or "retailer" lessors are included. See Cal.Rev. & Tax.Code § 6006(g) (West Supp.1980); Regulation 1660 (discussing lessors in the context of the sales tax). For the same reason, "buyer" encompasses lessee. This opinion will use these terms interchangeably.

THE CALIFORNIA SALES TAX SCHEME

Section 1656.1 of the California Civil Code sets standards for determining who--the seller or buyer--is to pay the sales tax on a particular transaction. It provides that whether the seller or buyer is to pay the sales tax depends on the agreement of sale between the parties. See Cal. Civil Code § 1656.1(a) (West Supp.1980).[3/] This section then sets forth three situations in which the tax is presumed to be paid by the

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3. Section 1656.1 provides as follows:

§ 1656.1 Sales tax reimbursement to retailer; addition to sales price; rebuttable presumptions; schedule

(a) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of

buyer: (1) when the agreement of sale expressly so provides; (2) when the sales tax is separately stated on the sales

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tangible personal property sold at retail to a purchaser if:

(1) The agreement of sale expressly provides for such addition of sales tax reimbursement;

(2) Sales tax reimbursement is shown on the sales check or other proof of sale; or

(3) The retailer posts in his premises in a location visible to purchasers, or included on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

(b) It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices:

(1) "All prices of taxable items include sales tax reimbursement computed to the nearest mill."

receipt; and (3) when the retailer posts a notice to that effect. Section 1656.1(b) states that the seller is

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(2) "The price of this item includes sales tax reimbursement computed to the nearest mill."

(c)(1) The State Board of Equalization shall prepare and make available for inspection and duplication or reproduction a sales tax reimbursement schedule which shall be identical with the following tables up to the amounts specified therein:

4 3/4 percent

Price	Tax
.01-.10	.00
.11-.29	.01
.30-.50	.02
.51-.72	.03
.73-.94	.04

5 percent

Price	Tax
.01-.10	.00
.11-.27	.01

presumed to have paid the tax if the seller posts a notice in his store that all prices include sales tax. Section

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Price	Tax
.28-.47	.02
.48-.68	.03
.69-.89	.04
.09-1.09	.05

5¼ percent

Price	Tax
.01-.10	.00
.11-.26	.01
.27-.45	.02
.46-.65	.03
.66-.84	.04
.85-1.03	.05

6 percent

Price	Tax
.01-.10	.00
.11-.22	.01

1656.1(d) states that these presumptions are rebuttable. Section 1656.1(c) sets forth several tables which compute the

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Price	Tax
.23-.39	.02
.40-.56	.03
.57-.73	.04
.74-.90	.05
.91-1.08	.06

6¼ percent

Price	Tax
.01-.10	.00
.11-.21	.01
.22-.37	.02
.38-.54	.03
.55-.70	.04
.71-.86	.05
.87-1.03	.06

sales tax at various percentages for purchases of approximately $1.00.

6½ percent

Price	Tax
.01-.10	.00
.11-.20	.01
.21-.35	.02
.36-.51	.03
.52-.67	.04
.68-.83	.05
.84-.99	.06
1.00-1.15	.07

(2) Reimbursement on sales prices in excess of those shown in the schedule be computed by applying the applicable tax rate to the sales price, rounded to the nearest cent by eliminating any fraction less than one-half cent or over to the next higher cent.

(3) If sales tax reimbursement is added to the sales price of tangible personal property sold at retail, the retailer shall use a schedule provided by the board, or a schedule approved by the board.

Sections 6012 and 6051 of the California Revenue and Taxation Code set standards for determining how much tax is paid. The sales tax is levied on the seller's gross receipts. See Cal.Rev. & Tax. Code § 6051 (West Supp. 1980).[4] Gross receipts are defined as, inter alia, the total amount of the lease price. Id. § 6012(a).[5] The lease price is the

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(d) The presumptions created by this section are rebuttable presumptions. (Added by Stats. 1978, c. 1211, p. 3915, § 1.)

4. Section 6051 provides in pertinent part:

§ 6051. Levy on retailers' gross receipts; rate

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at . . . [a specified rate] of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state. . . .

5. Section 6012 provides in pertinent part:

amount of rentals payable. See California State Board of Equalization, Sales and Use Tax Regulation 1660 (Regulation 1660). Most importantly, the final paragraph of Section 6012 further provides that if the seller establishes that he collected the sales tax from the

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§ 6012. Gross receipts; excluded items

(a) "Gross receipts" mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise. . . .

. . . .

(c)(8) For purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil Code shall apply in determining whether or not the retailers have absorbed the sales tax. (Emphasis added).

buyer the amount of the tax is deducted from the seller's gross receipts. See § 6012(c)(8). There is no similar deduction when the seller pays the tax himself.

LEGAL INCIDENCE OF CALIFORNIA SALES TAX SCHEME

[1,2] The legal incidence of a tax falls on the party who the legislature intends will pay the tax. See United States v. Tax Commission, 421 U.S. 599, 609, 95 S.Ct. 1872, 1878, 44 L.Ed.2d 404 (1975); First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 348, 88 S.Ct. 2173, 2178, 20 L.Ed.2d 1138 (1968). A determination of legal incidence is not, however, an inquiry into who is legally obligated to remit the collected tax to the state. That is, the legal incidence of a tax does not necessarily fall on the party who acts as conduit by forwarding collected taxes to

the state. See United States v. Tax Commission, 421 U.S. at 607, 95 S.Ct. at 1877. The concept of legal incidence must also be distinguished from the notion of economic burden. The constitution only prohibits the state from levying a tax on the United States; it does not prohibit the state from enacting a taxing scheme whose effect is to increase prices paid by the United States. Therefore, there is no constitutional violation if the state levies a tax on a lessor to the United States and the lessor recoups this tax payment by raising the lease price--increasing the economic burden--to the United States. See Gurley v. Rhoden, 421 U.S. 200, 204, 95 S.Ct. 1605, 1608, 44 L.Ed.2d 110 (1975); United States v. City of Detroit, 355 U.S. 466, 469, 78 S.Ct. 474, 476, 2 L.Ed.2d 424 (1958); Kern-Limerick, Inc.

v. Scurlock, 347 U.S. 110, 118, 74 S.Ct. 403, 408, 98 L.Ed. 546 (1954).

In determining who the legislature intends will pay the tax, the entire state taxation scheme and the context in which it operates as well as the express words of the taxing statute must be considered. See United States v. Tax Commission, 421 U.S. at 609-10 & n.8, 95 S.Ct. at 1878-79 & n.8 (finding that the tax scheme unavoidably required the suppliers to pass the tax on to the purchasers); United States v. City of Detroit, 355 U.S. at 469, 78, S.Ct. at 476 ("[I]n determining whether a tax is actually laid on the United States or its property the Court goes beyond the bare face of the taxing statute to consider all relevant circumstances.").

The California sales tax scheme in this case is unlike statutes struck

down in previous cases because it is facially neutral as to who is to pay the sales tax. Compare Cal. Civil Code § 1656.1(a) (West Supp.1980) ("Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale.") with United States v. Tax Commission, 421 U.S. at 608-09, 95 S.Ct. a 1878 (Mississippi statute requiring the buyer to pay tax to seller who would remit tax to the state); First Agricultural Natural Bank, 392 U.S. at 347, 88 S.Ct. at 2177 (Massachusetts statute requiring seller to collect tax from buyer). Despite the government's arguments to the contrary, the presumptions set forth in subsections (a) and (b) do not appear to be a subtle legislative attempt to require the seller to

pass the tax on to the buyer. Rather, these presumptions arise only after the parties have independently manifested their intentions as to who will pay the tax. Finally, the tables set out in subsection (c) appear only to be intended to assist retailers and consumers in calculating the tax on small, day-to-day purchases.

The seeming neutrality of section 1656.1 is rendered illusory, however, by the interaction of California Revenue and Taxation Code sections 6012 and 6051. As noted above, the sales tax is levied on the seller's gross receipts, Cal.Rev. and Tax.Code § 6051 (West Supp.1980), which are measured by the total lease price. See id.; Regulation 1660. If the lessor requires the lessee to pay the tax, the amount of the tax is deducted from the lessor's gross receipts

If the lessor pays the tax himself--absorbs the tax--and passes the economic burden of the tax on to the lessee as an increase in the lease price, the amount of the tax paid by the lessor is not deducted from his gross receipts. Since the sales tax is levied on the basis of the lessor's gross receipts, the lessor must remit a larger sum of money to the state as taxes if he absorbs the tax himself than if he collects the tax from the lessee. Therefore, the lessor maximizes his profit only if he separately states and collects the tax from the lessee. This point is clearly illustrated by the example in footnote 6.[6/]

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6. Assuming a $1,000 lease to the United States and a tax rate of 5 percent:

(1) The lessor separately states the sales tax and collects it from the lessee. He collects a total of $1,050-$1,000 lease price and 50 tax--

[3] Despite the facial neutrality of section 1656.1, the strong economic incentive created by Section 6012 all but

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from the lessee. Because he separately stated the tax and collected it from the lessee, the $50 he collected in tax is excluded from his gross receipts under § 6012. The lessor is, therefore, taxed on gross receipts of $1,000 and must remit $50 to the state. The lessor nets $1,000 on the lease.

(2) The lessor does not separately state the sales tax but instead passes it on to the lessee as an increase in price. He collects a total of $1,050 from the lessee. Because he has absorbed the tax under Cal.Civil Code § 1656.1(b) rather than added the tax to the total sales price under § 1656.1(a) he gets no exclusion from his gross receipts under § 6012. The lessor, therefore, pays a tax on gross receipts of $1,050 and must remit $52.50 to the state. The lessor nets $997.50 on the lease.

(3) The lessor does not separately state the sales tax and does not collect the tax from the lessee--his gross proceeds of the sale are considered to be $1,000. He receives $1,000 from the lessee. He pays a tax out of his pocket of $50--he nets $950 on the lease.

(4) The lessor separately states the sales tax, but does not collect the

compels the lessor to collect the tax from the lessee. In sum, the California sales tax scheme manifests a legislative intent that the lessee pay the sales tax. It places the legal incidence of the tax on the United States and, therefore, violates the United States' constitutional immunity from state taxation.

OTHER PART OF THE DISTRICT COURT'S JUDGMENT

[4] In Paragraph 4 of its order the district court held that certain leases of tangible personalty made pursuant to Government Services Administration (GSA) supply schedule contracts by contractors having cost-reimbursement contracts with the United States were leases made by the contractor

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tax from the lessee--the statute presumes his gross proceeds of the sales to be $1,050. He receives $1,000 from the lessee. He pays a tax of $52.50 out of his own pocket--he nets $947.50 on the lease.

as an agent of the United States and thus, were not subject to the imposition of the California sales tax. In Paragraph 5, the district court found that the California use tax is void under certain circumstances because it discriminates against the United States and its contractors. These portions of the district court's order are totally unsupported by anything in the record and must be vacated. See United States v. Washington, 641 F.2d 1368 (9th Cir. 1981); United States v. County of Humboldt, 628 F.2d 549, 551 (9th Cir. 1980).

[5-7] The district court also ordered that the SBE pay pre-judgment interest from the time it collected the taxes to the time judgment is entered and post-judgment interest from the time judgment is entered to the time it is

paid. The award of pre-judgment interest in a case under federal law is a matter left to the sound discretion of the trial court. Cf. Wessel v. Buhler, 437 F.2d 279, 284 (9th Cir. 1971) (securities fraud case). Awards of pre-judgment interest are governed by considerations of fairness, Rolf v. Blyth, Eastman Dillon & Co., 637 F.2d 77, 87 (2d Cir. 1980) and are awarded when it is necessary to make the wronged party whole. See Hembree v. Georgia Power Co., 637 F.2d 423, 430 (5th Cir. 1981). In this case the SBE has had the use of the United States' tax money from the time it collected the taxes. The record does not show that the district court abused its discretion in awarding pre-judgment interest from the date of entry of judgment, the district court was clearly correct. See 28 U.S.C. § 1961 (1976).

[8] Finally, the SBE argues that the district court's order requiring the SBE to refund taxes is a mandatory injunction requiring it to make refunds in amounts it has no way of calculating. This is incorrect. The district court's order of a refund simply follows from the court's conclusion that the SBE collected taxes in violation of the constitution. The issues raised as to the amount of the refund will be resolved at the trial on this issue.

* * *

Appendix B

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ATTORNEYS FOR THE UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-03359-R

UNITED STATES OF AMERICA,

Plaintiff

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendants

[Filed December 20, 1979;
Entered December 20, 1979]

J U D G M E N T

This action having come on for hearing before the Court upon the motion of the plaintiff for partial summary judgment and the motions of the defendant, Honorable Manuel L. Real, District Judge, presiding, and the issues having been duly heard and findings of fact and conclusions of law having been made, and good cause having been shown therefore,

It is hereby ORDERED, ADJUDGED and DECREED that:

1. With respect to leases to the United States, for purposes of federal constitutional immunity, the determination of where the legal incidence of a tax falls is a federal question.

2. With respect to leases to the United States, for purposes of federal constitutional immunity, the legal

incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code ("Tax Code") and Section 1656.1 of the California Civil Code ("Civil Code") and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether the United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution, from state taxation.

3. The sales tax provided for by the Tax Code and Civil Code and the rulings and regulations issued thereunder is and was imposed with respect to leases

of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to the United States, the sales tax is and was invidiously discriminatory against the United Sttes [sic] and its lessors in violation of the Federal Constitution.

4. Leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimburseable contracts with the United States and having been authorized by the United States to use GSA schedule contracts were leases made by the contractor as agent of the United States for procurement purposes and, as such, were

leases to the United States and were not subject to the California sales tax.

5. The California use tax is imposed without regard to whether the lessee is the user of the leased tangible personal property or not and, therefore, the imposition of the California use tax with respect to the use by non-lessee third-party contractors having cost-reimburseable contracts with the United States of tangible personal property leased pursuant to General Services Administration (GSA) schedule contracts on behalf of the United States by such contractors having been authorized by the United States to use GSA supply schedule contracts is illegal and void because such imposition discriminates against the United States and its contractors in violation of the Federal Constitution.

6. The precise issue of unconstitutional discrimination presented in this action was decided in favor of the United States by this Court in the case of United States v. State Board of Equalization, Civil No. 72-2568-R C.D. Calif., Judgment entered September 6, 1974, unreported, Amended Judgment Nunc Pro Tunc entered October 21, 1975, unreported, affirmed in part, 536 F.2d 294 (C.A. 9, 1976). That Judgment is now final and the issues finally decided by that Judgment were (1) that for purposes of federal immunity the legal incidence of the California sales tax falls upon the United States as lessee in violation of the constitutional immunity of the United States from state taxation and (2) the imposition of sales tax with resepct [sic] to leases to the United States -- rather than the use tax, which

is imposed with respect to other leases in California -- unconstitutionally discriminates against the United States and its lessors. Although the Ninth Circuit in its decision at 536 F.2d 294 only affirmed on legal incidences, both issues of legal incidence and disrimination wre [sic] fully briefed and presented to the Court, and thus, the defendant is collaterally estooped [sic] from relitigating issues of unconstitutional discrimination already resolved by this Federal District Court in Civil Action No 72-2568-R.

It is hereby further ORDERED, ADJUDGED AND DECREED that the defendant is permanently enjoined from collecting the sales or use tax on United States Government lease transactions in California as of December 31, 1979.

It is hereby further ORDERED, ADUDGED [sic] and DECREED that the defendant shall refund to the plaintiff all taxes (State and local) collected with respect to United States Government leases under the Tax Act and paid by the United States to its lessors and agent contractors and remitted to the defendant from January 1, 1979 to the date collection ceases.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant will pay the plaintiff pre-Judgment interest rate of 12% (unless Federal law provides for a greater interest rate at the time of payment) on all amounts due and owing to the plaintiff from the date the defendant collected the illegal taxes to the date this Judgment is entered and post-Judgment interest from the date this

Judgment is entered to the date the defendant pays the plaintiff.

It is hereby further ORDERED, ADJUDGED and DECREED that the issue of the amount of refund due and owing by the defendant to the plaintiff is hereby severed for separate trial proceedings to be conducted by this Court 180 days after the defendant ceases collection of the

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sales tax with respect to United States Government leases.

Dated at Los Angeles, California, this 10th day of December, 1979.

_____
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
ARTHUR M. GREENWALD
Assistant United States Attorney

By:_____

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Appendix C

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In the United States District Court

for the

Central District of California

No. CV-79-03359-R

UNITED STATES OF AMERICA,

Plaintiff

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendants

[Filed December 10, 1979]

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

NATURE OF THE ACTION

The plaintiff, United States of America, filed this action on August 30, 1979 against the defendant California State Board of Equalization for:

I. A declaratory judgment that the California sales tax as imposed on leases to the United States since January 1, 1979 to date is unconstitutional in that (1) the legal incidence of the California sales tax, for purposes of federal immunity, falls upon the United States as lessee, (2) the taxing scheme imposed with respect to leases to the United States discriminates against the United States and its lessors, and (3) the judgment of this Court in Civil Action No. 722568-R bars the plaintiff from relitigating the issue of unconstitutional discrimination;

II. Injunctive relief to prevent the defendant from continuing to collect the taxes in question; and

III. A refund of taxes illegally collected since January 1, 1979. The plaintiff United States of America requested that the issue of the amount of refund be severed and be deferred until after any and all appeals filed herein are final or a180 [sic] days after the defendant ceases collection, whichever occurs first.

In response to the plaintiff's Complaint, the defendant did not file an answer, but filed four motions pursuant to the Federal Rules of Civil Procedure (hereinafter "F.R.C.P."). The defendant moved pursuant to (1) Rule 12(b)(6), F.R.C.P., for a motion to dismiss for failure to state a claim, or in the alternative to make legal rulings, (2)

Rule 12(f), F.R.C.P., for a motion to strike certain portions of the Complaint, (3) Rule 12(c), F.R.C.P., for a motion for judgment on pleadings and (4) Rule 12(e), F.R.C.P., for a motion for more definite statements in complaint and in support thereof filed the declarations of Robert Nunes and Neal Gobar and a Memorandum of Points and Authorities.

The plaintiff filed an opposition to the defendant's motions and filed a Cross-Motion for Partial Summary Judgment requesting that judgment be entered in its favor on the merits.

The Government's opposition and Cross-Motion for Summary Judgment were supported by and based upon the Complaint, the Affidavit of of [sic] Janice K. Mendenhall, the Affidavit of Charles E. Stratton, a Memorandum of Points and Authorities in Support thereof, and all

other papers filed and proceedings had in this action.

The matter came on regularly for hearing before this Court on November 5, 1979 before the Honorable Manuel L. Real. Having considered the contents of all the pleadings, memoranda, exhibits, affidavits, declarations, the arguments of counsel, the entire file, and being fully advised, this Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This action was commenced at the request of plaintiff's General Services Administration and other federal agencies and is under the direction of the Attorney General of the United States.

2. This action was initiated to protect the plaintiff United States

of America's pecuniary interests and vindicate its sovereign rights.

3. The defendant, State Board of Equalization, is authorized to and administers and enforces the provisions of Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code, as amended (hereinafter "Tax Code"), the rules and regulations and local ordinances promulgated thereunder, and is the proper party defendant in this action.

4. The amount in controversy exceeds ten thousand dollars ($10,000), exclusive of interest and costs; plaintiff asserts invalidity under the Constitution of the United States; and the action is commenced by the United States.

5. The plaintiff now leases, and since January 1, 1979, has leased in

California data processing equipment and other taxable personal property from various lessors with respect to which California has imposed sales taxes.

6. From 1965 to June 1976, the State of California imposed a sales tax with respect to leases of tangible personal property to the United States.

7. This District Court in the case of United States v. State Board of Equalization, Civil Action No. 72-2568-R, C.D. Calif., entered its Judgment (unreported) on September 6, 1974 and entered its Amended Judgment Nunc Pro Tunc (unreported) on October 21, 1975 (hereinafter "Judgment") holding that the imposition of the sales tax with respect to leases of tangible personal property to the United States was in violation of the United States Constitution because (1) for purposes of federal

immunity the legal incidence of the tax falls on the United States as lessee and (2) the imposition of the sales tax with respect to leases to the United States, rather than the use tax, which is imposed with respect to other leases in California, unconstitutionally discriminates against the United States and its lessors.

8. The Ninth Circuit Court of Appeals on May 7, 1976 affirmed the Judgment of this Court, 536 F. 2d 294 (C.A. 9, 1976), holding that, based upon the decision of the Supreme Court in Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976), the legal incidence of the California sales tax falls upon the United States as lessee and not upon the vendors.

9. Although the issue was presented and fully briefed, the Ninth

Circuit did not address the question of discrimination in its opinion.

10. The Judgment of this Court is final and, insofar as is known, the defendant stopped collecting the sales tax with respect to leases to the United States on June 30, 1976, based upon the finality of the Judgment.

11. On September 26, 1978, the State of California adopted Chapter 1211 of the California Laws of 1978, effective January 1, 1979, which amended (hereinafter "1979 Amendments") the California Revenue and Taxation Code and added Section 1656.1 of the California Civil Code (hereinafter "Civil Code").

12. The defendant thereafter adopted Implementing Regulations (hereinafter "Regulations").

13. On January 20, 1979 the State of California adopted Senate Bill 243,

effective January 1, 1979, which adds Section 6381.5 to the Tax Code. Section 6381.5 of the Tax Code, in part provides an exemption from tax for:

> gross receipts from the lease of tangible personal property to the United States or an agency or instrumentality thereof, a sale to which would have been exempt, from sales tax prior to January 1, 1979 if the lease is pursuant to a contract for a fixed price in existence on September 26, 1978, which did not expressly provide for reimbursement to the lessor of any sales tax liability imposed on the lessor.

14. Section 6381.5 of the Tax Code, referred to in paragraph 13 above provides a "grandfather clause" or sales tax exemption for fixed-price leases in effect prior to September 26, 1978 (the effective date of the 1979 Amendments provided by Chapter 1211 of the California Laws of 1978), only in cases where a lessor cannot obtain reimbursement from its lessee.

15. Based on its interpretation of the 1979 Amendments, the defendant began to collect sales taxes and has collected sales taxes on leases of tangible personal property to the United States on January 1, 1979, despite this Court's Judgment in Civil Action No. 72-2568-R.

16. The defendant has taken the position since January 1, 1979 that, under the Tax Code and Civil Code, the

lessors' gross receipts from leases of property in California to the Federal Government, state banks, or insurance companies are includable in the measure of the lessors' sales tax.

17. Under many of the lease agreements between the plaintiff and its lessors, the plaintiff is contractually obligated to reimburse its lessors an amount equal to the amount of sales tax paid by the lessors measured by such leases. Since January 1, 1979 plaintiff has reimbursed certain of its lessors for some of the sales taxes remitted by them to the defendant. Under such agreements, the plaintiff is entitled to the benefit of any recovery by the lessors of sales taxes paid by the lessor to the defendant.

18. In this action plaintiff contended that as a matter of

Federal law the Tax Act unconstitutionally discriminates and the legal incidence of the sales tax falls on the Federal Government as lessee regardless of whether or not the Federal Government has contracted to reimburse to its lessors amounts of California sales tax paid by the lessors. Plaintiff contended that the contractural arrangement between the Federal Government and the lessor has no bearing on discrimination or where the legal incidence of the sales tax falls. In this action, however, the Federal Government sought recovery only in the amount of those taxes paid by its lessors for which the Federal Government has reimbursed its lessors.

19. Also, the United States asserted that certain leases which would appear to be made by third parties (plaintiff's contractors) are in fact

leases to the plaintiff because certain contractors were authorized to act as agents of the United States for procurement purposes.

20. The plaintiff requested that the amount of refund that the United States may be entitled to be determined by this Court at a later date after a final determination of the underlying legal principles presented in this action or 180 days after the defendant ceases collection, whichever occurs first.

21. Any of the following conclusions of law which are or may be deemed findings of fact are hereby incorporated herein as a finding of fact.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

1. This Court has jurisdiction over this action in accordance with

Sections 1331 and 1345 of Title 28, United States Code, as the matter in controversy (a) exceeds $10,000, exclusive of interest and costs; (b) arises under the United States Constitution; and (c) is brought by the United States of America.

2. With respect to leases to the United States, for purposes of federal constitutional immunity, the determination of where the legal incidence of a tax falls is a federal question.

3. With respect to leases to the United States, for purposes of federal constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code ("Tax Code") and Section 1656.1 of the California Civil Code "(Civil Code") and the rulings and regulations issued

thereunder falls and always has fallen on the United States as lessee whether the United States is contracturally obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution, from state taxation. Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976); Agricultural National Bank v. Massachusetts Tax Commission, 392 U.S. 339, 348 (1968); Kern-Limerick v. Scurlock, 347 U.S. 110 (1954). See also, Colorado Bank v. Bedford, 310 U.S. 41 at p. 52 (1940).

4. "Legal incidence" and "the legal obligation to pay the the tax" refers to the person to whom the State looks for

payment. The legal incidence of a tax is determined by looking both to the intent of the legislature as to how the statute is to operate in practice (not its intent with regard to legal conclusions) and to the practical operation and effect of the entire taxing statute. Agricultural National Bank v. Massachusetts Tax Commission, supra.

5. Although the California statute no longer contains the specific provisions regarding the vendor collecting the tax "insofar as can be done" and prohibition against advertising absorbtion of the tax, it is clear that the intent of the legislature and practical operation and effect of the statute as amended by the 1979 Amendments will operate to place the legal incidence on the United States as lessee.

6. The Supreme Court has consistently looked "through form and behind labels to substance." The City of Detroit v. Murray Corporation, 355 U.S. 489 (1958). Section 1656.1 of the Civil Code provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely on the terms of the agreement of sale. But, the 1979 Amendments create the statutory presumption that the consumer agreed to accept the burden of the sales tax. The presumption arises merely by the vendor adding the tax to the sales check or by the posting of signs, and advertisement or an indication on a price tag that the price includes the sales tax. Moreover, the statute establishes a taxing scheme whereby it would be highly unlikely that

a vendor would ever absorb the tax. The tax is imposed upon the gross receipts from sales. Section 6012 of the Code provides that gross receipts will not include the amount of the sales tax "if the retailer establishes to the satisfaction of the Board that the sales tax has been added to the total amount of the sales price and has not been absorbed by them" (separately stated) (emphasis added). "Thus, the statute provides presumptions and incentives to vendors to add the sales tax to the sales price and collect it from the purchaser by excluding tax collected from a vendor's gross proceeds of the sale.

7. The Tax Act, especially Section 1656.1 of the Civil Code infringes upon the bargaining process between the buyer and seller with respect to payment of the tax. It is clear from

the statutory and regulatory scheme that the vendor is in effect a conduit between the State and purchaser for the collection of a sales tax and therefore the practical operation of the taxing scheme places the legal incidence for purposes of federal constitutional immunity, of the sales tax on the United States as lessee. Agricultural National Bank, supra.

8. The sales tax provided for by the Tax Act and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to the United States, the sales tax is and was invidiously discriminatory against the

United States and its lessors in violation of the Federal Constitution. Phillips Co. v. Dumas School District, 361 U.S. 376, 387 (1960). See also, United States v. County of Fresno, 429 U.S. 452 (1977); United States v. City of Detroit, 355 U.S. 466, 473 (1958); Moses Lake Homes v. Grant County, 365 U.S. 744, 751 (1961).

9. Leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimbursable contracts with the United States and having been authorized by the United States to use GSA schedule contracts were leases made by the contractor as agent of the United States for procurement purposes and, as such, were leases to the United States and were not subject to the California sales tax.

10. The California use tax is imposed without regard to whether the lessee is the user of the leased tangible personal property or not and, therefore, the imposition of the California use tax with respect to the use by non-lessee third-party contractors having cost-reimbursable contracts with the United States of tangible personal property leased pursuant to General Services Administration (GSA) schedule contracts on behalf of the United States by such contractors having been authorized by the United States to use GSA supply schedule contracts is illegal and void because such imposition discriminates against the United States and its contractors in violation of the Federal Constitution.

11. The precise issue of discrimination presented in this action was

decided in favor of the United States by this Federal District Court in the case of United States v. State Board of Equalization, Civil No. 72-2568-R, C.D. Calif., Judgment entered September 6, 1974, unreported, Amended Judgment Nunc Pro Tunc entered October 21, 1975, unreported, aff'd, 536 F.2d 294 (C.A. 9, 1976). That Judgment is now final and the issues finally decided by that Judgment were (1) that the legal incidence of the California sales tax falls upon the United States as lessee in violation of the constitutional immunity of the United States from state taxation and (2) the imposition of sales tax with respect to leases to the United States -- rather than the use tax, which is imposed with respect to other leases in California -- unconstitutionally discriminates against the United States

and its lessors. (See Judgment and Final Findings of Fact and Conclusions of Law.) The Ninth Circuit in its decision at 536 F. 2d 294 affirmed only on legal incidence, although, both issues of legal incidence and discrimination were fully briefed and presented to the Court.

13. The defendant is collaterally estopped from relitigating the issue of discrimination resolved by this Federal District Court's Judgment in Civil Action No. 72-2568-R. See Montana v. United States, 440 U.S. 147 at pp. 153-154 (1979).

14. The tax payments demanded, remitted to, and received by the defendant with respect to the rentals paid under leases to the Government were erroneously remitted and illegally demanded and received.

15. The United States is entitled to recover from the defendant all taxes (State and local) collected with respect to United States Government leases under the Tax Act, enabling ordinances and regulations paid by the United States to its lessors and agent contractors and remitted to the defendant from January 1, 1979 to the date collection ceases.

16. The issue of the amount of refund due and owing by the defendant to the plaintiff shall be severed for separate trial proceedings to be conducted by this Court beginning 180 days after defendant ceases collection.

17. The plaintiff United States is also entitled to pre-Judgment interest at the rate of 12% (unless Federal law provides for a greater

interest from the Judgment to the date of payment.

18. Since this Court has jurisdiction over the action brought by the United States, it has jurisdiction to grant injunctive relief to the plaintiff, since it has been determined that the merits favor the plaintiff and because injunctive relief is prayed for in the Complaint and Authorities. Public Utilities Commission v. United States, 355 U.S. 534 (1958); Mayo v. United States, 319 U.S. 441 (1943); Board of Commissioners v. United States, 308 U.S. 343, 350 (1939).

19. The plaintiff is entitled to an injunction because it will suffer irreparable harm unles [sic] the defendant is restrained as of December 31, 1979 from further collection of taxes on all leases to the United States.

20. An injunction shall be granted to the plaintiff because continued collection by the defendant of these taxes would be illegal and would interfere with United States Government procurement and such collection is not in the public interest.

21. Any findings of fact deemed as or properly constituting a

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sales tax with respect to United States Government leases.

Dated at Los Angeles, California, this 10th day of December, 1979.

_____
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
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Assistant United States Attorney
Chief, Tax Division
ARTHUR M. GREENWALD
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Appendix D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-5073

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendant-Appellant.

[Filed September 2, 1981]

Before: KENNEDY and NELSON, Circuit Judges, and RICHEY, * District Judge

ORDER

Defendant-Appellant's PETITION FOR REHEARING, filed July 27, 1981, is DENIED.

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* Honorable Mary Anne Richey, United States District Judge, District of Arizona, sitting by designation.

Appendix E

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

(SD NO. CV 81-1588-R)

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendant and Petitioner.

PETITION FOR REHEARING

The defendant California State Board of Equalization (hereinafter sometimes "Board") hereby petitions under Federal Rules of Appellate Procedure, rule 40, for rehearing of its decision issued July 13, 1981, on the ground that the opinion overlooked the within described material facts and law which if

considered would result in the modifications requested hereinafter.

1. OVERLOOKED FACTS AND CALIFORNIA LAW SHOW LEGISLATIVE INTENT THAT THE CALIFORNIA SALES TAX BE PAID BY THE RETAILER (LESSOR) NOT BY THE LESSEE

The opinion incorrectly states that Civil Code section 1656.1 "set standards for determining who -- the seller or buyer -- is to pay sales tax on a particular transaction" (at p. 3536.) Section 6051[1/] of the Sales and Use Tax Law clearly states that "for the privilege of selling ..." a sales tax is "imposed upon all retailers...". Similar language was considered important in determining legal incidence was considered important in determining legal incidence by the U.S. Supreme Court

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1. All reference not indicating otherwise are to the California Revenue and Taxation Code.

(Gurley v. Rhoden (1975) 421 U.S. 200 at page 205) this court's opinion ignores that important part of section 6051, but instead inaccurately and incorrectly cites it as providing that the "sales tax is levied on the seller's gross receipts (at p. 3538) (emphasis added). The sales tax is measured by, not levied on gross receipts.

The opinion also totally ignores the strong and continued statement of the California Legislature and courts of California's intent that the California sales tax is imposed solely on the retailer (lessor) and cannot be recovered from the purchaser (lessee).[2/] In enacting the amendments

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2. This strong over 45-year administrative, judicial and legislative interpretation by California was felt adequate by the dissent in Diamond National v. State Board of Equalization

effective in 1979 which are in issue here, the California Legislature specifically stated its intent was "to make it clear that both for federal and state tax purposes the incidence of the California Sales Tax is upon the retailer and not upon the purchaser." (See A.O.B., p. 7.) This significant evidence of legislative intent also goes totally unmentioned in the opinion.

Section 1656.1 of the Civil Code deals solely with contractual relations between retailer (including lessors) and consumers (including lessees).

Footnote 2 continued:

(1976) 425 U.S. 268, to establish legal incidence on the retailer, even before California amended its sales tax law effective in 1979 to eliminate the language which the U.S. Supreme Court found in First Agricultural Nat. Bank v. Tax Comm'n (1968) 392 U.S. 399, to shift legal incidence from the retailer to purchaser.

It is not part of the "Sales and Use Tax Law". It deals only with "reimbursement" of sales taxes, i.e., voluntary contractual agreements between retailers and consumers pertaining to payment by consumers of "reimbursement" to retailers to cover the retailer's sales tax expense. It speaks only of and deals only with "reimbursement", not payment of the "sales tax" as the opinion says.

The opinion states that the California sales tax scheme "is facially neutral as to who is to pay the sales tax", citing Civil Code section 1656.1. Not so! The above-mentioned section 6051 and California's long consistent legislative declaration accompanying the 1979 amendments make clear California's intent that the sales tax is paid solely by the retailer and further that the purchaser has absolutely no obligation

to pay sales tax to the state as to the retailer.

True, as this court observes, said section 1656.1 (which is part of California's contract law which appears in its Civil Code) is careful to remain totally neutral whether and how a retailer and consumer contract with respect to "reimbursement by the consumer to the retailer of the retailer's sales tax expense. This court also correctly observes (p. 3539) that the presumption and tables in Civil Code section 1656.1 are not attempts to pass tax on.[3/]

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3. The presumptions generally were intended to clarify contractual arrangements and simplify determination of the tax measure in a manner protecting the consumer from unscrupulous retailers, benefiting the retailer by making the tax measure lower and benefiting consumers by facilitating their obtaining federal income tax benefits (see A.O.B., pp. 16-19). Some of these purposes were

The opinion overlooks material facts and erroneously interprets section 6012 in stating that "the strong economic incentive created by section 6012 all but compels the lessor to collect the tax from the lessee." (pp. 3539-40.)

Section 6012 is merely a definition of gross receipts. This is an important section which facilitates determination of the proper tax measure by both retailers and the Board. The last paragraph (erroneously called (c)(8) in footnote 5 of the opinion) says in substance that where the sales tax "has not been absorbed by" the retailers the

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Footnote 3 continued:

clearly expressed as part of the legislation changing the law (see A.O.B., pp. 16-17).

taxable sales price shall exclude the amount of tax.[4/] It states that Civil Code section 1656.1 shall apply in determining if the retailer "absorbed" the tax.

The last paragraph of section 6012 has been broadly applied and construed by the Board to authorize measure exclusion by a retailer of the amount of his sales tax whenever the retailer's records indicate in any manner that the sales price includes an amount for tax reimbursement or that the

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4. If this section had been omitted from § 6012 a retailer who sold an item for $1,000,000 under a contract which provided that the purchaser shall also reimburse the seller for sales tax would have to pay sales tax not only on the $1,000000 ($60,000), but also on the $60,000 of the seller's tax being paid by the purchaser which is gross receipts to the seller ($3,600), plus tax on the $3,600, etc., until the additional payments by the purchaser fell below an amount which gave rise to further tax.

retailer has taken sales tax into consideration in determining the total sales price of the merchandise.[5/]

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5. This interpretation is illustrated by the Board's audit manual which states the following, (among other things) with respect to the procedure of determining gross receipts for sales tax purposes:

"Other retail establishments such as markets, taverns, and restaurants often find that separation of the sales price from tax reimbursement is not practical and the entire amount charged the customer is credited to sales. In the latter cases, the taxpayer is entitled to a deduction for sales tax included in total sales, provided he can prove to the satisfaction of the board he has not absorbed the tax but has actually taken it into consideration in determining the total sales price of the merchandise.

". . .

"Sales tax included should be allowed in all audits where sales have been estimated if the basic factors in the estimate include sales tax. For example, where prices which include sales tax are used to develop a mark-up of purchases, the sales estimated by the mark-up method will have the tax included."

The meaning and effect of the last paragraph of section 6012 is simply to say that any evidence that the amount of sales tax was taken into consideration in arriving at a sales price (and thus not "absorbed" by the retailer) will allow exclusion by the retailer of the amount of tax he pays from this tax measure. To assure that the amount of sales tax he pays is excluded from his tax measure, a retailer need only provide evidence to the Board that he took sales tax into account in setting the sales price. This evidence can consist not only of a separate statement of sales tax reimbursement in the contract, but alternatively of a posted sign, advertisement or statement in a lease or contract which merely says that the price

"includes" sales tax or sales tax reimbursement. It may also consist of totally internal documents of a retailer never seen by the purchaser such as price breakdowns which show that in arriving at the sales price the retailer's sales tax expense has been taken into consideration (see fn. 5, supra).

This court's opinion totally overlooks the many situations where retailers sell at lump sum prices with no separation of any "sales tax" or "sales tax reimbursement" in their invoices or otherwise, but are premitted under section 6012 to exclude their sales tax from their gross receipts. (E.g., markets, taverns, restaurants, fn. 5, supra.) In such situations the customer normally has no knowledge whether the retailer has absorbed the

tax or added it in determining sales prices and thereby passed it on through the higher prices. Specifically it overlooks the evidence before this court that in substantial numbers of large contracts such as the computer leases to the United States of America in issue, lump sum prices are used without any mention of sales tax reimbursement (A.O.B., p. 20).

This court's suggestion that section 6012 "all but compels the lessor to collect the tax from the lessee" (at p. 3540) is simply wrong.[6/] All a retailer need do to exclude his sales tax from his tax measure is to retain evidence that his sales price includes

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6. There is no evidence supporting this conclusion. There is evidence against this conclusion and this court may (and is requested to) judicially notice the Board's audit manual and

consideration of his sales tax (and thus the sales tax was not "absorbed" by the retailer), i.e., he added in an amount for sales tax in determining his sales price.

Portions of hypothetical statements in the opinion's footnote 6

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Foonote 6 continued:

and administrative interpretation set out above.

As a rule of statutory construction on interpretation (such as asserted here by the Board of section 6012) which upholds its constitutionality must be adopted wherever possible rather than one (such as the court's conclusion) which results in unconstitutionality.

Since this is an appeal from granting summary judgment to the United States of America all missing facts must be against the United States of America. The United States of America has not shown that section 6012 all but compels the retailer "to collect the tax" from the purchaser.

(p. 3539) misinterpret California law and are wrong.[7/]

Footnote 6 is completely inaccurate and misleading. It should be deleted from the opinion. The opinion should reflect that under section 6012 in order to exclude the sales tax he pays

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7. These were apparently taken from the brief of the United States. As pointed out in Appellant's Reply Brief (pp. 7-8-), these hypotheticals are inaccurate and misleading. Those hypotheticals do not indicate what notices were given or evidence provided to the Board that the sales tax was taken into consideration in reaching the sales price. Thus, hypothetical number 2 where sales tax is passed on as an increase in price the Board will as stated in Appellant's Reply Brief, page 8, collect tax only on the $1,000 figure. This example is simply wrong. The third hypothetical to be accurate must necessarily assumed that the lessor in no way considered the amount of sales tax in reaching his $1,000 price but chose to "absorb" that tax himself and thus waived the benefit of excluding his sales tax from his tax measure. Example (4) is also wrong. If a retailer separately states sales tax reimbursement that amount is excluded from his sales tax measure. Whether or

from his tax measure, a retailer (including lessor) need only show to the satisfaction of the Board that a sales tax amount has been considered in reaching the sales price. This is exactly the circumstances which existed in Gurley v. Rhoden (1975) 421 U.S. 200, where the Supreme Court held that by the "increasing (a retailers) pump prices in the amount of the taxes" the legal incidence was not shifted to the purchaser (even though that tax had been described as a "user tax") (pp. 206-207). That opinion does not mention whether at any point a purchaser is advised of the amount of the added tax and therefore apparently considers

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Footnote 7 continued:

not he ever collects such amount from his lessee or purchaser is strictly a matter of contract law between the parties.

it irrelevant. The Board submits that the Gurley case is clearly applicable here and requires that this court conclude that the legislative intent is that the California sales tax is paid only by the retailer, that the retailer is not compelled to collect any tax or tax reimbursement from his customer (purchaser or lessee) nor does he have any authority to do so (other than the authority which all persons in his free country have to contract with other equally free persons to pay or reimburse any amounts to each other that they should choose to pay).

A rehearing should be granted to eliminate from the opinion the erroneous statements described here above and to add the opinion the material facts with respect to the Legislature's declared

intent, the material fact that a substantial number of contracts dealing with transactions of the size in issue do not provide for "tax reimbursement", and the true effect and purpose of section 6012 which is required for the purpose of a reasonable determination of a tax measure and which provides in substance that any manifestation that the amount of sales tax a retailer must pay is considered by him in determining his sales price entitles a retailer to exclude such amount from his tax measure. These facts make it clear that the legal incidence of the California sales tax is under the authority of Gurley v. Rhoden, supra, solely upon the retailer.

2. PARAGRAPH 6 OF THE JUDGMENT SHOULD BE VACATED

Paragraph 6 of the Judgment of the District Court states that the State

Board is collaterally estopped by an earlier decision from contesting the position of the United States here that including gross receipts from leases to the United States in a retailers sales tax is unconstitutionally discriminatory. The United States did not argue this in its brief, but instead appeared to concede the error of this portion of the declaratory judgment (Appellee's Brief, p. 29, fn. 20) and has not disputed the Board's request that this portion of the judgment must be reversed (Appellant's Reply Brief, p. 13). Therefore, to make the record clear and avoid the problems discussed under heading 3 herein, this court should specifically vacate paragraph 6 of the Judgment.

3. THIS COURT SHOULD RULE THAT NO UNCONSTITUTIONAL DISCRIMINATION EXISTS

This court found it unnecessary to reach the discrimination issue p. 3535). It is important that this issue be reached and decided promptly.

District Court Judge Real has ruled three times that California sales tax unconstitutionally discriminates when applied to the receipts of lessors from leases to the United States.[8/] The United States in this action obtained a judgment from Judge Real (see paragraph 6) that his earlier discrimination ruling collaterally estopped the Board even though that ruling was appealed and this court never reached the issue (536 F2d 294).

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8. He did so first in a 1972 case appealed to this court which affirmed solely on the legal incidence ground (536 F2d 294). He next did so in this case. He has done so again in 81-1588-R, one week after this court declined to rule on this question.

We anticipate therefore that the United States will press the same position as a result of this case, and will certainly do so as a result of Judge Real's July 20, 1981, ruling in 81-1588-R, unless the Board appeals that ruling to this court and obtains a ruling in that case on the discrimination issue. The discrimination issue should be laid to rest by a ruling in this case that the California sales tax is not discriminatory.

Judge Real did not ever state any basis for his rulings. The United States asserted that California sales tax on retailers measured by their gross receipts from leases to the United States is discriminatory, even though no heavier burden is laid on them,[9/] solely because

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9. The measures of the sales tax and use tax are identical. See §§ 6201 and 6010 (use tax); §§ 6051 and 6012 (sales tax).

it is a different tax (from the use tax collected with respect to most leases) and it is laid on a different taxpayer (the lessor rather than the lessee). The cases cited in Appellant's Opening Brief, pages 23 to 25 and Reply Brief, pages 11 to 13, particularly Southern Pac. Co. v. Gallagher (1939) 306 U.S. 167 and United States v. County of Fresno (1977) 429 U.S. 452, clearly hold that unconstitutional discrimination does not exist merely because a different but equal tax is collected from a different taxpayer.[10/]

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10. Here, however, sales and use taxes are normally collected by the state from the same person, i.e., retailer-lessor. See Revenue and Taxation Code section 6051 imposing sales tax on retailers. See section 6202 and 6203 imposing the obligation on each retailer to collect from its customers and remit to the state use taxes, or pay the equal amount to the state. A single tax return is filed by the retailer containing both sales and use taxes.

Further the United States is not singled out for application of the sales tax. All leases are subject to sales tax and use tax initially. However, those on which use tax is paid are exempted from the sales tax. Thus, all leases to lessees who are exempt from the use tax are subject to the sales tax, not only those to the United States. The primary entities also exempt from the use tax are insurance companies and (prior to 1980) state and national banks. Finally, any difference in treatment of leases to the United States results not from any act of the State of California but from the United States' claim of sovereign immunity, which excuses it from paying use tax. A state law is not unconstitutionally discriminating when the difference is required by Federal law (see Appellant's Reply Brief, p. 12).

Clearly, the California sales tax is not discriminatory in including the gross receipts from leases to the United States in the measure of a retailers tax. This court should specifically so rule.[11/]

4. THE DISTRICT COURT RULING THAT INTEREST IS PAYABLE AT 12 PERCENT OR HIGHER . . . SHOULD BE VACATED

The court's opinion discusses the discretion of the trial court to grant prejudgment interest in any refunds. The Board does not oppose the

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11. As Judge Real has repeatedly determined that discrimination exists, a ruling containing the basis for such a determination should be made. Judge Real has given no clues as to his grounds for so ruling. If in fact its sales tax is discriminatory, the Board should be so advised by a ruling of this court in which the specific basis of such discrimination is outlined. Only in such a manner can the Board seek appropriate legislation to correct and eliminate such discrimination.

payment of appropriate prejudgment interest and did not so argue on this appeal.

The Board did argue that judgment here is a partial summary judgment and that the motion for partial summary judgment did not ask for any ruling on the question of the appropriate rate or method of collecting interest. Like paragraphs 4 and 5 of the judgment

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Footnote 11 continued:

Should this court feel that notwithstanding the foregoing it is unnecessary to rule on discrimination, the language of the District Court judgment finding discrimination should be vacated or this court should otherwise make it clear that the District Court's determination may not be used (as the United States has attempted in the past with respect to the earlier case) as authority to collaterally estop or otherwise prevent the State Board of Equalization from asserting that sales tax is not constitutionally discriminatory when applied to gross receipts from leases to the United States.

which this court ordered vacated for lack of substantiation in the record, the paragraph referring to interest was merely added to the judgment submitted by the United States after the court granted its motion without any earlier suggestion that any interest question was before the court and without anything in the record supporting the language of the Judgment. Further, it conflicts with the final paragraph in the Judgment which specifically defers a determination of the amount of refund.

Even were it proper to include a declaration pertaining to the collection of interest, no authority has been cited to support the declaration in the specific partial summary judgment here:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant will pay the plaintiff pre-Judgment interest at the rate 12% (unless federal

> law provides for a greater interest rate at the time of payment) on all amounts due and owing to the plaintiff from the date that defendant collected the illegal taxes to the date the Judgment is entered and post-Judgment interest from the date this Judgment is entered to the date defendant pays the plaintiff." (Judgment p. 4, ll. 16-23, excerpts, p. 239).

Under the Sales and Use Tax Law interest is paid on refunds.[12/] The Board submits that any interest payable to the United States as lessees should be the same interest and would be payable to the retailer had he filed a suit for refund. Thus, should this court feel it

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12. Section 6907 provides interest on over payments of tax at 1% per month from the due date on claims for refund. Section 6936 provides that in any judgment on suit for refund interest shall be allowed at the rate of 12% per annum on the amount illegally collected from the date of payment to the date to be determined by the Board preceding the date of the refund warrant by not more than 30 days.

is proper for the District Court to make a determination of the amount of interest it is submitted that the order should simply state the interest shall be paid as provided in the Revenue and Taxation Code section 6936.[13/]

The rates of interest on tax refunds have varied from year to year (see e.g., 26 U.S.C. §§ 6611, 6621). Prior to 1976 California provided for 6% interest. The 12% rate may go down. There is absolutely no basis for the language in the Judgment placing a bottom of 12% on the interest rate to be paid on refunds at some future date.

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13. In objections to the conclusions of law and judgment the Board specifically pointed out its statutes governing interest and inquired what federal law applied (excerpts, p. 231, paragraph I).

The Board submits the interest provisions submitted by the United States and signed by the court contained in the judgment here in issue constitutes an abuse of discretion under the circumstances here where at no time has any authority been cited for payment of interest in the manner prescribed or for placing a 12% minimum on the rate yet leaving a maximum rate to be determined by some unidentified federal law.

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CONCLUSION

Rehearing should be granted to allow consideration of the overlooked facts and law and correction of the errors of fact and misstatement of California law discussed herein.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General

By_____
NEAL J. GOBAR,
Deputy Attorney General

Appendix F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-5073

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendant-Appellant.

[Filed November 13, 1981]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (Supreme Court Rule 10)

Notice is hereby given that the California State Board of Equalization, the Defendant and Appellant above-named, hereby appeals to the Supreme Court of the United States from those portions of the final judgment of the United States Court of Appeals, Ninth

Circuit, entered in this action on July 13, 1981, (Petition for Rehearing filed July 27, 1981, was denied by the Court of Appeals on September 2, 1981) affirming the judgment of the United States District Court, for the Central District of California entered December 20, 1979, in case number CV 79-03359-R.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: November 12, 1981.

GEORGE DEUKMEJIAN, Attorney General

By_____
NEAL J. GOBAR,
Deputy Attorney General

Attorneys for Defendant
California State Board of Equalization

Appendix G

California Revenue and Taxation Code § 6051.

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2-1/2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2-1/2 percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3-3/4 percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4-3/4

percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3-3/4 percent on and after October 1, 1973, and to and including march 31, 1974, and at the rate of 4-3/4 percent thereafter.

* * *

Appendix H

California Revenue and Taxation Code § 6006.

"Sale" means and includes:

(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(c) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others.

(d) The furnishing, preparing, or serving for a consideration of food, meals, or drinks.

(e) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(f) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(g) Any lease of tangible personal property in any manner or by any

means whatsoever, for a consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or his transferor acquired the property

in a transaction that was a retail sale with respect to which the lessor or the transferor has paid the sales tax or as to which the lessor or the transferor has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(b) A decedent from whom the lessor acquired the property by will or the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980, and not subject to local property taxation.

* * *

Appendix I

California Revenue and Taxation Code § 6012.

(a) "Gross receipts" mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(1) The cost of the property sold. However, in accordance with such rules and regulations as the board may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose, than reslae, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration, or

display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(2) The cost of the materials used, labor or service cost, interest paid, losses, or any other expense.

(3) The cost of transportation of the property, except as excluded by other provisions of this section.

(4) The amount of any tax imposed by the United States upon producers and importers of gasoline and the amount of any tax imposed pursuant to Part 2 (commencing with Section 7301) of this division.

(b) the total amount of the sale or lease or rental price includes all of the following:

(1) Any services that are a part of the sale.

(2) All receipts, cash, credits and property of any kind.

(3) Any amount for which credit is allowed by the seller to the purchaser.

(c) "Gross receipts" do not include any of the following:

(1) Cash discounts allowed and taken on sales.

(2) Sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned. For the purpose of this section refund or credit of the entire amount shall be deemed to

be given when the purchase price less rehandling and restocking costs are refunded or credited to the customer.

(3) The price received for labor or services used in installing or applying the property sold.

(4) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or the consumer.

(5) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California upon or with respect to retail sales of tangible personal property measured by a stated percentage of sales price or gross receipts whether imposed upon the retailer or the consumer.

(6) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California with respect to the storage, use or other consumption in such city, county, city and county, or rapid transit district of tangible personal property measured by a stated percentage of sales price or purchase price, whether such tax is imposed upon the retailer or the consumer.

(7) Separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer; provided, that if the transportation

is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the sale of the property is made to the purchaser.

(8) The amount of any motor vehicle fee or tax imposed by and paid to the Sate of California that has been added to or is measured by a stated percentage of the sales or purchase price of a motor vehicle.

For purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil Code shall

apply in determining whether or not the retailers have absorbed the sales tax.

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Appendix J

STATE BOARD OF EQUALIZATION
AUDIT MANUAL

GENERAL AUDIT PROCEDURE

AUDIT OF SALES TAX INCLUDED IN SALES	0416.00
GENERAL	0416.05

Some retailers, when accounting for total sales, record only the sales price of the merchandise in the sales account and credit sales tax reimbursement to a reserve account. This procedure contemplates a separation of the sales price from the sales tax on either sales tickets or cash register readings. In any event, sales tax collected is not included in reported gross sales.

Other retail establishments such as markets, taverns, and restaurants often find that separation of

the sales price from tax reimbursement is not practical and the entire amount charged the customer is credited to sales. In the latter cases, the taxpayer is entitled to a deduction for sales tax included in total sales provided he can prove to the satisfaction of the board he has not absorbed the tax but has actually taken it into consideration in determining the total sales price of the merchandise.

* For periods on and after January 1, 1979, certain presumptions concerning the addition of sales tax reimbursement are created by Civil Code Section 1656.1. It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if:

(A) The agreement of sale expressly provides for such addition of sales tax reimbursement;

(B) Sales tax reimbursement is shown on the sales check or other proof of sale; or

(C) The retailer posts in his premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his premises, or includes on a price

tag or in an advertisement (whichever is applicable) one of the following notices:

(A) "All prices of taxable items include sales tax reimbursement computed to the nearest mill."

(B) "The price of this item includes sales tax reimbursement computed to the nearest mill."

* [Added in May 1979.]

AUDITING PROCEDURE 0416.10

In cases where a sales tax accural account is maintained, the clerical accuracy and propriety of the amounts posted to that account should be verified. In cases where a deduction is claimed for sales tax included in reported gross sales, the auditor should determine:

(a) That total amounts of sales tickets are entered in sales journal.

(b) If sales tickets are not prepared, that sales tax is rung up on

the cash register if it is added to selling prices.

(c) That where sales tax is not added to sales prices, effect was given to the tax by the retailer in determining the total sales prices.

This deduction is computed after the balance of the audit is completed and is based on audited sales (purchases subject to use tax not included) minus deductions. In order to avoid the allowance of sales tax included on disallowed deductions on which sales tax was not charged, the audited taxable sales (tax included) should be decreased by the amounts of such disallowed sales. Sales tax included in taxable sales may then be computed:

(a) If the rate is 6-1/2% - multiply taxable sales (tax included) by .06103

(b) If the rate is 6% - multiply taxable sales (tax included) by .05660

(c) If the rate is 5% - multiply taxable sales (tax included) by .04762

Sales tax included should be allowed in all audits where sales have been estimated if the basic factors in the estimate include sales tax. For example, where prices which include sales tax are used to develop a mark-up of purchases, the sales estimated by the mark-up method will have the tax included.

May 1979

* * *

Appendix K

California Statutes of 1978, chapter 1211, section 19:

The Legislature in adopting the Sales Tax Act in 1933 intended that the incidence of the sales tax be on the retailer. In Section 8 of Chapter 681 of the Statutes of 1941, the following statement appears: " . . . the Legislature hereby declares and reaffirms that the sales tax is not imposed on any purchaser of tangible personal property in this state, but is for the privilege of engaging in the business of selling such property." Notwithstanding such legislative intent and decisions of California courts holding that the incidence of the California sales tax is upon the retailer and not upon the purchaser, the United States Supreme Court in Diamond National Corp. v. State Board of Equalization, 47

L.Ed.2d 780, and the Court of Appeals for the Ninth Circuit in United States of America v. State Board of Equalization, 536 F.2d 294, held that for federal purposes the incidence of the California sales tax is on the purchaser. This act provides for changes in the California Sales and Use Tax Law to make it clear that for both federal and state tax purposes the incidence of the California sales tax is upon the retailer for the privilege of selling tangible personal property at retail and is not upon the purchaser. This act is not intended to affect any litigation or claims for refund relating to taxable periods prior to the effective date hereof.

* * *

Appendix L

California Revenue and Taxation Code § 6201.

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2-1/2 percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3-3/4 percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4-3/4 percent on and after July 1, 1973, and to and including September 30,

1973, and at the rate of 3-3/4 percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4-3/4 percent thereafter.

* * *

Appendix M

California Revenue and Taxation Code § 6203.

Except as provided by Sections 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respect leases constituting sales of tangible personal property, the tax shall be collected from the lessee at

the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

* * *

Appendix N

California Revenue and Taxation Code § 6390.

There are exempted from the computation of the amount of the sales tax the rentals payable under a lease of tangible personal property (a) when such rentals are required to be included in the measure of the use tax or (b) when such property is situated outside this state.

* * *

Appendix O

California Revenue and Taxation Code § 6401.

The storage, use, or other consumption in this state of property, the gross receipts from the sale of which the purchaser establishes to the satisfaction of the board were included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease.

* * *

Motion to Dismiss or Affirm

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No. 81-1000

In the Supreme Court of the United States

OCTOBER TERM, 1981

CALIFORNIA STATE BOARD
OF EQUALIZATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the imposition of the California sales tax on leases of tangible personal property to the United States violates the federal government's immunity from state taxation under the Supremacy Clause (Article VI, Section 2) of the Constitution.

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In the Supreme Court of the United States

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No. 81-1000

CALIFORNIA STATE BOARD OF EQUALIZATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States of America moves that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (J.S. App. A-35 to A-62) and the judgment of the district court (J.S. App. A-25 to A-34) are not officially reported. The opinion of the court of appeals (J.S. App. A-1 to A-24) is reported at 650 F.2d 1127.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1981 (J.S. App. A-1). A petition for rehearing was filed on July 27, 1981 (J.S. App.

A-62). The notice of appeal was filed on November 13, 1981 (J.S. A-92). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATUTES INVOLVED

Chapter 1211 of the 1978 Cal. Stats. which, *inter alia*, repealed §§ 6052 and 6053, added § 6012 of the Cal. Rev. & Tax. Code (West Cum. Supp. 1981) (J.S. App. A-101 to A-107) and § 1656.1 to the Cal. Civ. Code (West Cum. Supp. 1981) (J.S. App. A-6 n.3).

STATEMENT

During the period in question, California has had a complementary and correlative sales and use tax system, under which a tax is imposed upon sales of tangible personal property in the state, and upon the use of tangible personal property in the state where such property has escaped the sales tax. Prior to 1965, leases of tangible personal property were not taxed. However, in 1965, California amended its sales and use tax statute to include leases of tangible personal property within the scope of the use tax. The definition of the term "sales" was also amended to include a "lease of tangible personal property." All leases subject to the use tax, however, were exempt from the sales tax. Since leases to the United States were exempt from the imposition of the State's use tax because of the federal government's immunity from state taxation, leases of tangible personal property to the United States were not exempt from the State's sales tax statute. Although the California statutes recognized that sales of property to the United States were exempt from state taxation, the 1965 amendments to the California sales tax statutes specifically excluded from the statutory exemption

rentals payable under a lease. As a result, beginning in 1965 the State Board of Equalization took the position that sales taxes were payable with respect to leases of tangible personal property to the United States, and it attempted to collect such taxes from the lessors (J.S. App. A-3).

In 1972, the United States brought an action in the United States District Court for the Central District of California seeking a declaratory judgment that, with respect to leases to the United States, the legal incidence of this California sales tax fell upon the United States as lessee and, thus violated its immunity from state taxation under the Constitution. On September 6, 1974, the district court ruled in favor of the government. It held that the imposition of the sales tax in question on leases to the United States was unconstitutional on the grounds that: (1) the legal incidence of the tax fell upon the United States as lessee, and (2) the tax invidiously discriminated against the United States and its lessors (J.S. App. A-41 to A-42). While that case was pending on the State's appeal to the court of appeals, this Court decided *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976), in which it held that the California sales tax, as applied to leases to a national bank, violated the federal government's immunity from state taxation because the legal incidence of the tax fell upon the bank as lessee. On the authority of this Court's decision in *Diamond National Corp.*, the court of appeals affirmed the district court's 1974 judgment. *United States* v. *State Board of Equalization*, 536 F.2d 294 (9th Cir. 1976).

Thereafter, on September 26, 1978, the State of California amended its sales tax provisions in an attempt to circumvent the decisions in *Diamond National Corp.*, *supra*, and *United States* v. *State Board of*

Equalization, supra (J.S. App. A-114 to A-115). This amendment was effected by the adoption of 1978 Cal. Stats. ch. 1211, effective January 11, 1979, which repealed §§ 6052 and 6053 and added § 6012 of the Cal. Rev. & Tax. Code, and which also added § 1656.1 to the Cal. Civ. Code (West Cum. Supp. 1981).

The United States thereupon initiated this suit, seeking a declaratory judgment that even after January 1, 1979, the legal incidence of the California sales tax on leases of tangible personal property continued to fall on the lessee and to infringe upon the federal government's constitutional immunity from state taxation. The government also alleged that the tax invidiously discriminated against the United States and those with whom it contracts.

The district court severed for subsequent trial the issue of the amount of any refund due the United States (J.S. App. A-33) and granted the government's motion for partial summary judgment, concluding that the state statute as amended continued to violate the immunity of the United States from state taxation and further concluding that the statute unconstitutionally discriminates against the United States and its vendors (J.S. App. A-24, A-27 to A-28).

The court of appeals affirmed. It held that in amending the California sales tax statute, the legislature intended that the lessee-vendee pay the sales tax in question so that the legal incidence of the tax continued to fall on the United States with respect to leases of tangible personal property to the government. The tax therefore violated the federal government's immunity from state taxation. In view of its ruling, the court of appeals found it unnecessary to consider whether the taxing scheme discriminated against the United States and its vendors (J.S. App. A-2).

ARGUMENT

The decision below correctly held that the legal incidence of the California sales and use tax fell on the United States as lessee of tangible personal property and therefore violated the federal government's constitutional immunity from state taxation.

1. It is beyond question that a state tax violates the constitutional immunity of the United States from state taxation if the legal incidence of the tax falls upon the United States, absent its consent to imposition of the tax. *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976); *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, 348 (1968); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See also *Colorado Bank* v. *Bedford*, 310 U.S. 41, 52 (1940). Moreover, whether the legal incidence of a state tax falls upon the United States is a question of federal law upon which the decisions of state courts are not controlling. *Agricultural Bank* v. *Tax Commission, supra; United States* v. *Nevada Tax Commission*, 439 F.2d 435, 439 (9th Cir. 1971).

Here, appellant argues that the legal incidence of the California sales tax is not on the purchaser or lessee because there is neither a direct legal obligation placed upon such parties to pay the state tax in question, nor an express mandatory statutory direction that the seller or retailer pass on the sales tax in question to the purchaser or lessee (J.S. 48, 51). Appellant's argument, however, has previously been considered and rejected by this Court. *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339 (1968); *United States* v. *Mississippi Tax Commission*, 421 U.S. 599 (1975).

In *Agricultural Bank*, the Supreme Judicial Court of Massachusetts (353 Mass. 172, 229 N.E.2d 245 (1967)) held that the legal incidence of a Massachusetts sales tax fell on the vendor and not on the purchaser, because the vendor had the legal obligation to pay the tax to the State. This Court, however, reversed. It concluded that the legal incidence of the sales tax was on the purchaser, despite the lack of any legal obligation on the purchaser to pay the tax or sanction against the seller for failing to pass the tax on to the purchaser, because the Massachusetts Legislature intended that the sales tax be passed on to the purchaser. *Agricultural Bank* v. *Tax Commission*, *supra*.

Thus, it is the legislative intent, rather than the existence of any legal obligation in the statute, that was deemed controlling. Indeed, in *United States* v. *Mississippi Tax Commission*, *supra*, the Court reaffirmed its decision in *Agricultural Bank* stating (421 U.S. at 607): "In *First Agricultural Nat. Bank* v. *Tax Comm'n*, 392 U.S. 339 (1968), we squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." In *United States* v. *Mississippi Tax Commission*, *supra*, the Court concluded that the legal incidence of a tax on liquor purchases by military installations fell upon the United States, because the state tax commission intended that the liquor distillers and suppliers pass on the tax to the military purchasers. The Court added that (421 U.S. at 610 n.8): "* * * even in the absence of * * * [such] intentions, obviously economic realities compelled the distillers to pass on the economic burden of the markup [tax]." It is therefore beyond question that the legal incidence of a sales tax is on the purchaser if it appears from the

entire taxing scheme that the legislature intends that the tax be passed on to the purchaser or if the economic realities of the tax scheme are such that the vendor is compelled to pass on the tax. *United States* v. *Mississippi Tax Commission*, *supra*, 421 U.S. at 609-610. See also *United States* v. *City of Detroit*, 355 U.S. 466 (1958).

2. In accordance with the decisions of this Court, the court below correctly determined that the California Legislature intended that the sales tax in question be paid by the purchaser or the lessee because § 6012 of the Cal. Rev. & Tax. Code (West Cum. Supp. 1981) created an economic incentive which all but compelled the lessor to collect the tax from the lessee (J.S. App. A-20 to A-21). In so holding, the court of appeals noted that by its 1978 amendments to its sales tax, the California Legislature had repealed those sections of the California Code of Revenue and Taxation which had previously been found unconstitutional (J.S. App. A-4). The court further acknowledged that the amended statute (§ 1656.1 of the Cal. Civ. Code (West Cum. Supp. 1981)) purported on its face to adopt a neutral position on whether the seller-lessor or purchaser-lessee paid the state sales tax (J.S. App. A-6). The court, however, correctly concluded that, contrary to appellant's central contention (J.S. 25-34), the seeming neutrality of Section 1656.1 was rendered illusory by the interaction of §§ 6012 and 6051 of the Cal. Rev. & Tax. Code (West Cum. Supp. 1981) (J.S. App. A-18).

Although § 1656.1(a) of the Cal. Civ. Code (West Cum. Supp. 1981) provides that whether the seller or buyer is to pay the sales tax depends on the agreement of sale between the parties, it goes on to set forth three situations in which the tax is presumed to be paid by the buyer: (1) when the sales agree-

ment expressly so provides; (2) when the sales tax is separately stated on the sales receipt; and (3) when the retailer posts a notice in his store that all prices include sales tax.[1] Sections 6012 and 6051 of the Cal. Rev. & Tax. Code (West Cum. Supp. 1981) govern how the amount of tax due is to be computed. Under Section 6051, the sales tax is levied on the seller's gross receipts which are measured by the total sales or lease price. Section 6012 defines the term "gross receipts" and provides that if the seller or lessor establishes, pursuant to § 1656.1 of the Cal. Civ. Code (West Cum. Supp. 1981), that he has not absorbed the sales tax, but has rather added it to the sales price, the sales tax will be excluded from "gross receipts" for purposes of computing the amount of the sales tax that is due.

As the court of appeals correctly pointed out (J.S. App. A-19 to A-20) "the lessor must remit a larger sum of money to the state as taxes if he absorbs the tax himself than if he collects the tax from the lessee," because the sales tax is levied on the basis of the lessor's "gross receipts" and such receipts do not include the amount of the sales tax if the tax is passed on to the purchaser. Thus, the lessor maximizes his profit if he separately states and collects the tax from the lessee.[2] This strong economic

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[1] The presumptions set forth in § 1656.1(a) are rebuttable. See § 1656.1(d).

[2] The court illustrated this conclusion with the following example (J.S. App. A-19 to A-21 n.6):

> Assuming a $1,000 lease to the United States and a tax rate of 5 percent:
>
> (1) The lessor separately states the sales tax and collects it from the lessee. He collects a total of $1,050—1,000 lease price and 50 tax—from the lessee. Because he separately stated the tax and collected it from the lessee,

incentive under § 6012 to pass on the tax virtually compels the lessor to collect the tax from the lessee (J.S. App. A-20 to A-21).

Appellant asserts (J.S. 27) that the court of appeals was wrong in concluding that the lessor maximizes his profits *only* if he separately states and collects the tax from the lessee. It points out that under § 6012 the lessor's gross receipts will not include the amount of the sales tax whenever the lessor establishes that he has not absorbed the tax but rather has included the tax in the determination of his sales price. But any misstatement on the court's part in this regard is immaterial because the crucial fact remains that the tax statutes in their entirety provide a strong economic incentive for

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the $50 he collected in tax is excluded from his gross receipts under § 6012. The lessor is, therefore, taxed on gross receipts of $1,000 and must remit $50 to the state. The lessor nets $1,000 on the lease.

(2) The lessor does not separately state the sales tax but instead passes it on to the lessee as an increase in price. He collects a total of $1,050 from the lessee. Because he has absorbed the tax under Cal. Civil Code § 1656.1(b) rather than added the tax to the total sales price under § 1656.1(a) he gets no exclusion from his gross receipts under § 6012. The lessor, therefore, pays a tax on gross receipts of $1,050 and must remit $52.50 to the state. The lessor nets $997.50 on the lease.

(3) The lessor does not separately state the sales tax and does not collect the tax from the lessee—his gross proceeds of the sale are considered to be $1,000. He receives $1,000 from the lessee. He pays a tax out of his pocket of $50—he nets $950 on the lease.

(4) The lessor separately states the sales tax, but does not collect the tax from the lessee—the statute presumes his gross proceeds of the sales to be $1,050. He receives $1,000 from the lessee. He pays a tax of $52.50 out of his own pocket—he nets $947.50 on the lease.

the lessor to pass on and collect the tax from the lessee (by separately stating the tax or otherwise including the tax in the determination of the sales price) rather than absorbing the tax himself. Indeed, appellant expressly concedes (J.S. 41) that Section 6012 creates an incentive to shift the economic burden of the tax to the lessee. This economic incentive, as the court below correctly held, destroys the seeming neutrality of the statute as to who bears the burden of the tax and manifests an intent on the part of the legislature that the tax be passed on and collected from the lessee. Accordingly, the legal incidence of the tax is on the lessee and as a result the tax statute violates the constitutional immunity of the United States from state taxation.[3] *Agricultural Bank* v. *Tax Commission, supra*; *United States* v. *Mississippi Tax Commission, supra.*

3. Contrary to appellant's assertion (J.S. 43), the decision below does not conflict with *Gurley* v. *Rhoden*, 421 U.S. 200 (1975). There, the State of Mississippi imposed a sales tax upon the gross receipts of a taxpayer holding a gasoline distributor's permit

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[3] Appellant (J.S. 38-39) also seeks to rely on the declaration of legislative policy which accompanied the 1978 amendments to California's sales tax statutes, in which the legislature announced that such amendments were enacted for the specific purpose of reversing the decisions in *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976) and *United States* v. *State Board of Equalization*, 536 F.2d 294 (9th Cir. 1976). But this announced legislative purpose does not, of itself, control the matter. The question still remains whether the legal incidence of California tax is on the vendee or lessee. Here, the critical fact is that the taxing scheme virtually compels the lessor to pass on and collect the sales tax from the lessee. Hence, the legal incidence of the tax is on the lessee.

in Mississippi, which he utilized in importing gasoline in Mississippi and selling the gasoline at several outlets in the State. In computing the sales tax upon his gross receipts, the taxpayer sought to deduct from those gross receipts the amounts which he had paid to the federal government on account of his liability for the federal tax imposed on "producers" of gasoline (as statutorily defined in 26 U.S.C. 4082(a)). He also sought to deduct the Mississippi excise tax imposed on gasoline distributors who import tax-free gasoline into the state. The taxpayer argued that the two excise taxes were imposed upon the ultimate consumer and that he acted merely as a conduit between the consumer and the taxing authorities with respect to these tax receipts. It therefore followed, he maintained, that the taxes should be deducted from his gross receipts in computing his Mississippi sales tax liability. This Court disagreed, holding that the excise taxes in question were the liability of the taxpayer as a distributor under Mississippi law and as a statutory producer under federal law. The Court also pointed out that these excise taxes were imposed on the producer at a time prior to any point of retail sale or other consumer transaction. *Gurley* v. *Rhoden*, *supra*, 421 U.S. at 210. Further, in reaching its decision, this Court examined both the federal statute and its legislative history and stated that the congressional purpose to lay the federal excise tax in question on the producer and only upon the producer could not be more plainly revealed (*id.* at 205).

This Court's conclusion that the legal incidence of the state and federal excise taxes involved in *Gurley* was on the distributor-taxpayer rather than his customers is not at odds with the decision below. Unlike this case, the taxing schemes at issues in *Gurley* did not evidence any legislative intent that the distributor or

producer should collect the taxes from the ultimate consumers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

INTRODUCTION

Appellee's "Motion to Affirm" herein was received February 1, 1982. This response requests that said motion be denied and this case either be reversed without hearing or heard in tandem with Washington v. United States of America, No. 81-969.

In this case, United States of America asserts that a state may not impose a complementary sales tax on retailers who lease to U.S.A. Under such tax law, U.S.A. has absolutely no legal obligation to pay or reimburse the lessor who must pay the tax. U.S.A. asserts (and the Court of Appeals erroneously ruled) that an economic incentive to pass the burden of the California sales tax on, alone and in the face of substantial facts proving otherwise, proves a legislative intent that the sales tax be passed on--and this unconstitutionally places the "legal incidence" on the U.S.A. as lessee.

Such a holding violates the clear, longstanding rule of the court that passing on the economic burden of a tax (to one who has no legal obligation to either pay the tax or reimburse the

taxpayer does not shift the incidence of the tax to the one who bears the economic burden. (Alabama v. King & Boozer (1941) 314 U.S. 1; Gurley v. Rhoden (1975) 421 U.S. 200.) U.S.A. apparently is attempting to make inroads on this rule and expand its immunity on the basis of rulings that a tax law which gives the taxpayer the specific legal right to recover the tax he must, from his customer, shift the "legal incidence" to the customer. (See Agricultural Bank v. Tax Commission (1968) 392 U.S. 339, 346-348(where the tax statute gave the retailer a specific legal right to recover the sales tax it paid from his customer); Diamond National v. State Equalization Board (1976) 425 U.S. 268 (tax statute construed the same as Agricultural Bank statute for federal

purposes); United States v. Mississippi Tax Commission (1975) 421 U.S. 599 (a liquor markup, held to be a sales tax, required by state regulation to be invoiced to and collected from military purchasers (under penalty of liquor license revocation) held to be on military purchaser).)

First, U.S.A. misinterprets the holdings of and rule applied by this Court in the Massachusetts and Mississippi cases. (Motion to Affirm, pp. 5-7.)

Second, U.S.A. tries to invalidate the tax because of an "economic incentive" (Motn to Aff. p. 7-9) to pass on the economic burden of the tax.

Third, in Gurley v. Rhoden, supra, 421 U.S. 200, this Court determined that evidence of legislative intent to

place the legal incidence of the federal excise tax on the producer (similar to that present here, but totally ignored by U.S.A. and the lower court), indeed had this effect, even though the amount of the tax was in fact added by the producer to his prices. SBE submits that the above authorities of this Court clearly uphold the validity of the present California sales tax under the "legal incidence" test.

The authorities from this Court cited in the Jurisdictional Statement (pp. 52-56) clearly show that there is no unconstitutional discrimination here (and the District Court ruling below and 9th Circuit ruling in Washington v. U.S.A. No. 81-969) should be reversed.

* * * * *

ARGUMENT

THE AGRICULTURAL BANK AND MISSISSIPPI TAX COMMISSION CASES DO NOT ESTABLISH UNCONSTITUTIONALITY HERE

Both these cases are consistent with the longstanding "legal incidence" rule that only when the state places a legal obligation on the U.S.A. is the tax invalid. In the Agricultural Bank case, this Court found a shift of legal incidence (for federal constitutional purposes) from retailer to his customer. This Court stated,

> "a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. . . . There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that the sales tax be passed on to the purchaser." (Agricultural Bank v. Tax Comm'n., supra, 392 U.S. at pp. 347-348, emphasis added.)

The Massachusetts sales tax statute itself clearly gave the retailer the legal right to collect the sales tax

amount (which the retailer paid to the state) from his customers (in courts of law if necessary).

The Mississippi case relied directly on the Agricultural Bank case and language just quoted. (U.S. v. Mississippi Tax Comm'n., supra, 421 U.S. at pp. 607-608.) In the Mississippi case this Court viewed a mandatory liquor "markup" was as a sales tax. (Id., at pp. 608, 610.) The state Regulation 25 (imposing the markup) plainly required distillers to pass on the markup to and collect it from military customers. (Id., at pp. 608-609.) It relied heavily on the Tax Commission's own interpretation of its regulation contained in a letter to distillers which imposed sanctions on distillers if the markup was not "invoiced to the Military and collected

directly from the Military. . ." (Id., at p. 609.)

There is in California's sales tax law here in issue, neither a legal right of the retailer to collect the tax from the customer (as in Massachusetts), nor any sanction or penalty (as in Mississippi) on retailers if they chose to make no mention of sales tax reimbursement in dealing with their customers.

II

SECTION 6012 DOES NOT SHIFT LEGAL INCIDENCE TO THE CUSTOMER

The California sales tax is unquestionably an excise tax on retailers for the privilege of engaging in business measured by their gross receipts from sales (including leases). (Cal. Rev. & Tax. Code, § 6051.)

The Court of Appeals found a

shift of legal incidence to the lessee (or purchaser) solely from a provision (in § 6012 of the sales tax statutes) that if the retailer does not absorb the tax, the amount of the tax may be excluded from the tax measure. (Appen. I to Jurisdictional Statement, pp. A-106 - A-107.)[1/] The effect of this is not, as U.S.A. and the Court of Appeals erroneously say (Motn. to Aff., pp. 8-10) to allow such exclusion only if a separately stated charge for sales tax (reimbursement) is made to the customer. The Motion to Affirm sets out in footnote (pp. 8-9) examples, which originated from U.S.A.'s earlier brief and have been shown several times simply to misstate the effect of the

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1. This has long been California law. Only the last sentence was added in 1979.

California sales tax law. (See Juris. Stmt., pp. 26-36.) Under section 6012 as interpreted and applied (see Appen. J to Juris. Stmt., pp. A-108 - A-113), any time a retailer shows that he has passed on the economic burden of the sales tax on him, he may deduct from this tax measure the amount of sales tax he must pay--whether or not the customer knows that the retailer has taken his sales tax into consideration in setting the sale (or lease) price.

The U.S.A. now says that this error is not material because the "strong economic incentive for the lessor. . .including the tax in the determination of the sales price [ ] rather than absorbing the tax himself" shifts the legal incidence. (Motn. to Aff., pp. 9-10.) This position is

directly contra to Alabama v. King & Boozer, supra, 314 U.S. 1, and all its progeny, which hold that the shifting of the economic burden of a tax (rather than absorbing it) does not render a tax an unconstitutional tax on U.S.A. In all situations there is a strong economic incentive for a retailer to pass on the economic burden of his sales taxes, all other taxes he pays, and all his other costs in setting his sales prices. Section 6012 does not change this. This strong economic incentive exists without section 6012.

Section 6012 simply does not evidence any intention of the California Legislature that the legal incidence of the California sales tax be borne by the customer. Particularly, such an inference is incorrect in the face of a specific

declaration by the Legislature of its intent to the contrary. (Appen. K to Juris. Stmt., pp. A-114-A-115.)

III

GURLEY v. RHODEN DIRECTLY SUPPORTS CONSTITUTIONALITY OF CALIFORNIA'S SALES TAX

This Court in Gurley v. Rhoden, supra, 421 U.S. 200, relied on the same type of analysis as SBE makes here to conclude that the legal incidence of the federal excise tax was not passed on to consumers. It is the closest factual analogy available and should control the result here. (See Juris. Stmt. pp. 43-52.)

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CONCLUSION

Earlier decisions of this Court clearly support the constitutionality of California's present sales tax, both against legal incidence and discrimination charges.

This Court should either reverse without hearing or grant a hearing in tandem with No. 81-969.

Respectfully submitted,

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DATED: _____